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CLASS ACTIONS AND EMPLOYMENT DISCRIMINATION UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Paul O. Miller, III

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Lawrence J. Franck

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CLASS ACTIONS AND EMPLOYMENT DISCRIMINATION UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

*Paul O. Miller, III**

Title VII of the Civil Rights Act of 1964[1] prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin. It provides a procedure whereby a person claiming to be aggrieved may file a charge with the Equal Employment Opportunity Commission, whose duty it is then to investigate the charge and, if reasonable cause exist to believe that the charge is true, seek to eliminate any such alleged unlawful employment practices found to exist by informal methods of conference, conciliation, and persuasion.[2]

Although the Act emphasizes the conciliatory approach when reasonable cause is found to believe an unlawful employment practice exists, the courts have held that as a prerequisite to instituting suit in federal court, the aggrieved party in a Title VII proceeding need only: (1) file a timely charge with the EEOC; and (2) receive the statutory thirty day right to sue letter,[3] and therefore actual conciliation efforts are not required when reasonable cause is found to believe a violation has occurred. This line of reasoning has been extended so that an aggrieved party can file a charge with the EEOC, wait sixty days,[4] ask for the right to sue letter, and then, within thirty days thereafter proceed

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[1]42 U.S.C., §§ 2000e (1) — (15) (1964).

[2]The Equal Employment Opportunity Commission does not have enforcement powers and if unable to achieve voluntary compliance, must issue a notice to the aggrieved party informing him of his right to bring a private suit in federal court. 42 U.S.C. §§ 2000e—5 (a), (e) (1964).

[3]Beverly v. Lone Star Lead Const. Co., 437 F.2d 1136 (5th Cir. 1971); Flowers v. Local 6, Laborers Union, 431 F.2d 205 (7th Cir. 1970); Fekete v. United States Steel Corp., 424 F.2d 331 (3d Cir. 1970); Cunningham v. Litton Indus., 413 F.2d 887 (9th Cir. 1969); Miller v. International Paper Co., 408 F.2d 283 (5th Cir. 1969); Dent v. St. Louis-S. F. Ry., 406 F.2d 399 (5th Cir. 1969); Johnson v. Seaboard Air Line R.R., 405 F.2d 645 (4th Cir. 1968), *cert. denied*, 394 U.S. 918 (1969).

[4]The EEOC Rules and Regulations provide that at any time after the expiration of sixty days from the date of the filing of the charge, the charging party may demand in writing that a notice of right to sue letter issue. 29 C.F.R. § 1601.25a (c) (1971).

immediately into court without the EEOC conducting an investigation or even serving a copy of the charge on the respondent.[5]

In those cases in which the EEOC fails to find that reasonable cause exists to believe an unlawful employment practice has occurred, the aggrieved may nevertheless bring suit in federal court,[6] based on the dismissed charge.

Thus, although Congress envisioned a framework in which conciliatory efforts would be the primary methods to eliminate unlawful employment practices under Title VII, the courts have chosen to arrogate from the EEOC the role of champion of the aggrieved. Such a role, although resented by those sued, is perhaps the most efficient and effective method of eliminating unlawful employment practices. The big stick of the injunction, even as only a threat by the aggrieved party, carries far more weight than does the conciliation agreement toward the permanent elimination of discriminatory barriers to equal employment opportunity.

In this vein, the most effective device for achieving the result sought by Title VII is the class action, the subject of this article. Since its enactment Title VII has caused a furor in the courts, primarily over procedural questions. The matter of the class action has raised a series of questions that are still somewhat unresolved, causing disagreement and some confusion in the various federal courts of this country. It is in the hope of deciphering the maze of decisions and offering a guide for practitioners facing this complex area of the law that this article is written.

I. The Issues That May be Raised in Bringing The Class Action

The Fifth Circuit Court of Appeals has set forth the following requirements for bringing a class action under Title VII: (1) The class must meet the requirements of Rule 23 of the Federal Rules of Civil Procedure; and (2) the issues raised must be those which the plaintiff had standing to raise and did raise before the EEOC.[7]

The question of what issues the plaintiff has standing to raise has caused some interesting litigation, especially when the plaintiff is a job applicant. In *Carr* v. *Conoco Plastics, Inc.*,[8] the court held that a job

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[5]Johnson v. ITT-Thompson Indus., Inc., 323 F. Supp. 1258 (N.D. Miss. 1971).

[6]Beverly v. Lone Star Lead Const. Co., 437 F.2d 1136 (5th Cir. 1971).

[7]Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968).

[8]295 F. Supp. 1281 (N.D. Miss. 1969), *aff'd per curiam,* 423 F.2d 57 (5th Cir. 1970), *cert. denied,* 400 U.S. 951 (1970).

applicant may raise issues as to in-plant discriminatory practices, even though the aggrieved is not an employee, when those practices, although not injurious to him at the time of his application for employment, potentially affect him because of his race. In the court's language: "It is foolhardy to say that once plaintiffs have removed racial discriminatory practices at the door, they are required to start anew in order to remove those that exist on the inside."[9]

The court in *Johnson v. ITT-Thompson Industries, Inc.*[10] expanded the *Carr* decision by holding that the job applicant can raise various in-plant issues in his complaint before the court even though the EEOC charge was limited to the refusal to hire. In the court's opinion, the in-plant racial discriminatory policies were sufficiently relevant to the hiring policy discrimination to allow the plaintiff to include the former in the complaint.

Subsequent to *Johnson,* the Fifth Circuit in *Danner v. Phillips Petroleum Co.*[11] held that the complaint in federal court may encompass any discrimination "like or reasonably related to the allegations of the charge and growing out of such allegations."[12] Although a liberal interpretation of this rule would allow the complaint to be substantially expanded beyond the charge as it was in *Johnson,* the facts in *Danner* were more restricted. Mrs. Danner in her EEOC charge only alleged unlawful discharge but expanded her complaint to include unlawful seniority and bidding practices. However, she was discharged when her job was eliminated, and due to discriminatory seniority and bidding practices, she could not transfer to another job. Therefore, the reasons for her discharge were reasonably related to her allegation of unlawful discharge.

Thus, although *Danner* was limited by the facts as to how far the charge may be expanded in the complaint, the court in *Johnson* did not have any qualms with a substantial expansion. In view of the extent to which the courts have eroded the EEOC's role in Title VII cases by holding that it is not necessary that the EEOC be given an opportunity to conciliate where reasonable causes exists to believe a violation has occurred,[13] or investigate the charge, or even serve the charge on the respondent,[14] allowing the plaintiff in his complaint to substantially expand the charge is the corrollary to the previous decisions that is to be expected.

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[9] *Id.* at 1289.

[10] 323 F. Supp. 1258 (N.D. Miss. 1971).

[11] 447 F.2d 159 (5th Cir. 1971).

[12] *Id.* at 162.

[13] See authority cited in note 3 *supra.*

[14] Johnson v. ITT-Thompson Indus., Inc., 323 F. Supp. 1258 (N.D. Miss. 1971).

Since in some cases the procedure before the EEOC satisfies a mere technical prerequisite to court action with the EEOC performing only a clerical role, there is little necessity for restricting the aggrieved party to his EEOC charge. In those cases in which the respondent has not been served with the charge or, having been served, no investigation is conducted by the EEOC, the respondent is not prejudiced by an expansion of the charge. However, a more strict rule should be utilized in those cases in which an EEOC investigation has been conducted and a decision rendered, finding reasonable cause exists to believe a violation has occurred. In those cases the respondent has placed some reliance on the allegations before the EEOC as constituting the case against him. Further, the respondent may not have been willing to conciliate those allegations but would have had a different inclination if all the allegations of the complaint had been made before the EEOC.

II. Meeting The Rule 23 Requirements

The second requirement for bringing a class action under Title VII as set forth in *Oatis v. Crown Zellerbach Corp.*,[15] is that the requirements of Rule 23 of the Federal Rules of Civil Procedure must be met.

Rule 23 (a) contains the following requirements: (1) the class must be so numerous that joinder of all members is impracticable; (2) there must be questions of law or fact common to the class; (3) the claims or defenses of the representative parties must be typical of the claims or defenses of the class; and (4) the representative parties must fairly and adequately protect the interests of the class.

In addition to satisfying the requirements of Rule 23 (a), the class action must fall within the purview of one of the subsections of Rule 23 (b).[16]

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[15]398 F.2d 496 (5th Cir. 1968).

[16]Fed. R. Civ. P. Rule 23 (b) provides:

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds

However, this latter mentioned requirement has not posed any substantial problem to the courts as they have allowed class actions under Title VII to be maintained under both Rule 23 (b) (2) [17] and Rule 23 (b)(3).[18]

Therefore the remainder of this article will delimit itself primarily to the requirements under Rule 23 (a).

A. The Numerosity Requirement

Rule 23 (a)'s requirement that the class must be so numerous as to make joinder of all members impracticable has, like the other requirements under Rule 23, been subject to different interpretations.

In *Local 246, Utility Workers Union v. Southern California Edison Company,*[19] the defendant contended that as to one plaintiff there were only eight persons who could constitute a class and as to the other plaintiff, there was only one person. However, the court pointed to the fact that the bringing of a class action is a matter of judicial discretion and in upholding the class action, stated:

> The very nature of the Civil Rights Act contemplates the bringing of a class action by even a small number of discriminated-against persons on behalf of all who are similarly situated.

> generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole, or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

[17] *See* Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968); Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968); Rios v. Local 638, Steamfitters Union, 3 FEP Cases 897 (S.D. N.Y. 1971); Roman v. Reynolds Metals Co., 3 FEP Cases 228 (S.D. Tex. 1970); Moss v. Lane Co., Inc., 50 F.R.D. 122 (W.D. Va. 1970); Butler v. Local 4, Laborers Union, 308 F. Supp. 528 (N.D. Ill. 1969); Local 186, Pulp Union v. Minnesota Mining and Mfg. Co., 304 F. Supp. 1284 (N.D. Ind. 1969). *See also* Notes of Advisory Committee on Rules Relating to 1966 Amendments of Fed. R. Civ. P. 23 (b) (2), 28 U.S.C., Appendix 1601 (Supp. III 1967).

[18] *See* Mack v. General Elec. Co., 329 F. Supp. 72 (E.D. Pa. 1971); Gerstle v. Continental Airlines, Inc., 50 F.R.D. 213 (D. Colo. 1970).

[19] 2 FEP Cases 328 (C.D. Calif. 1969).

> Its purpose is to afford a broad remedy which comes to the rescue of all persons fitting the class of the plaintiffs. A class action is proper under Title VII filed on behalf of all persons who have applied and who will apply to an employer for employment.[20]

A contrary holding is found in *Chavez v. Rust Tractor Co.*,[21] an action alleging unlawful discharge brought by a Spanish-surnamed former employee. The records revealed only ten other such persons had been discharged by the employer since the effective date of Title VII, and the court held that such a class is not so numerous as to make joinder, if they desired, impracticable.

Although in these two cases the courts' divergent holdings are based on the numerosity requirements, the latent reasoning is based upon the definition of the class. In *Local 246,* the court actually rejected the defendant's contention as to the scope of the class and broadened the class to include future as well as present employees; in *Chavez,* the court limited the class to the Spanish-surnamed employees who had already been discharged.

Actually the numerosity requirement is not critical to those employees who want to participate in the litigation since, if there are not a sufficient number to bring a class action, they can join as co-plaintiffs under the rule of *Oatis v. Crown Zellerback Corp.*[22] This is permissible regardless of whether they have pursued their remedies before the EEOC. Thus the only persons who are harmed by the failure of a class action are those who fail to assert their rights and join as co-plaintiffs. However, this does not preclude them from pursuing their Title VII rights themselves before the EEOC and if necessary, later in federal court.

B. Common Questions of Law or Fact

Rule 23 (a) (2) requires that there be questions of law or fact common to the class. The Fifth Circuit as well as a number of district courts have followed an "across the board" concept in race discrimination cases and held that since race discrimination is by definition class discrimination, the common question of fact is the question of discrimination because of race. In the words of the courts, the "Damoclean threat of a racially discriminatory policy hangs over the racial class [and] is a ques-

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[20] *Id.*

[21] 2 FEP Cases 339 (D.N.M. 1969).

[22] 398 F.2d 469 (5th Cir. 1968).

tion of fact common to all members of the class."[23] Although the cases adopting this approach recognize there will be varying individual factual circumstances, they hold that this does not defeat a class action, as it is not necessary that the common facts dispose of the entire litigation.

Although the prevailing view seems to be the "across the board" theory, there has been some disagreement with that approach, and one court has specifically rejected it.[24]

Even among the courts that have adopted this approach there has been disagreement as to how far it can be extended. Several courts have held that there is a common question of fact as to such conditions as segregated comfort facilities, the elimination of which would involve only injunctive relief. However, these courts have also held that there is no common question of fact as to specific past acts of individualized discrimination such as refusal to hire or promote or discriminatory discharge as redress for these wrongs would require affirmative relief.[25] This did not pose a stumbling block to the court in *Manning v. General Motors Corp.*,[26] holding that such individual matters could be handled by a special master appointed pursuant to Rule 53 of the Federal Rules of Civil Procedure.

Although the Fifth Circuit Court of Appeals has adopted the "across the board" approach, it has also recognized that there may be some issues that are not common to the entire class and if so, the trial court may utilize sub-classes with each co-plaintiff representing the subclass that would have issues of fact or law common to him.[27] The weakness of this approach is that it requires co-plaintiffs, and these may be unattainable. However, it is more in conformance with the requirements of Rule 23 (a) (2) than the special master approach utilized in *Manning* and affords more protection to absent class members.

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[23]Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969); Hall v. Werthan Bag Corp., 251 F. Supp. 184 (M.D. Tenn. 1966). For other cases adopting this approach, *see* Mack v. General Elec. Co., 329 F. Supp. 72 (E.D. Pa. 1971); Wilson v. Monsanto Co., 315 F. Supp. 977 (E.D. La. 1970); Younger v. Glamorgan Pipe and Foundry Co., 310 F. Supp. 195 (W.D. Va. 1969); Logan v. General Fireproofing Co., 309 F. Supp. 1096 (W.D. N.C. 1969); Carr v. Conoco Plastics, Inc., 295 F. Supp. 1281 (N.D. Miss. 1969), *aff'd per curiam*, 423 F.2d 57 (5th Cir. 1970), *cert. denied*, 400 U.S. 951 (1970).

[24]Hyatt v. United Aircraft Corp., 50 F.R.D. 242 (D. Conn. 1970).

[25]Kemp v. General Elec. Co., 1 FEP Cases 723 (N.D. Ga. 1969); Hall v. Werthan Bag Corp., 251 F. Supp. 184 (M.D. Tenn. 1966).

[26]3 FEP Cases 104 (N.D. Ohio 1971).

[27]Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969); Oatis v. Crown Zellerbach, Inc., 398 F.2d 496 (5th Cir. 1968).

Although most of the cases in which the "across the board" approach has been applied have alleged discrimination on the basis of race, the same reasoning, i.e., race discrimination is class discrimination, has been extended to sex discrimination cases[28] and can just as well be extended to those cases alleging religious or national origin discrimination.

C. Typical Claims or Defenses

The requirements of Rule 23 (a) (3) that the claims or defenses of the representative be typical of those of the class is usually glossed over by the courts, especially those that adopt the "across the board" approach. Generally these courts reason that if individual differences in the issues of fact do not defeat the class action, neither do individual differences in the claims for relief. In *Hyatt v. United Aircraft Corp.*,[29] cited previously as rejecting the "across the board" concept, the court pointed to the individual differences in claims and held that the requirement set forth in Rule 23 (a) (3) was not met.

D. Adequacy of Representation

The "across the board" approach, which seems to be the prevalent theory, has some obvious advantages.

The plaintiff can attack a pattern of discrimination and the variety of forms in which it appears without the necessity of combining with others who may be reluctant to join him, and through the class action he can join others without the necessity of their pursuing Title VII remedies themselves. Thus, if he is of a chivalrous nature he can help a large number of others similarly situated who may be too docile to help themselves. At the very least this approach enhances the plaintiff's bargaining power with the defendant during litigation or even prior to instituting suit by the mere threat of bringing a broad class action.

However, the area of concern is the absent class members. These persons benefit if the plaintiff wins by being freed from the thralldom of discriminatory practices and policies without having to emerge and carry the banner. However, as was recognized by the court in *Williams v. American Saint Gobain Corp.*[30] if the plaintiff succeeds in eliminating racially discriminatory policies, the benefits are enjoyed by others simi-

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[28]Manning v. General Motors Corp., 3 FEP Cases 104 (N.D. Ohio 1971); Gerstle v. Continental Airlines, Inc., 50 F.R.D. 213 (D. Colo. 1970).

[29]50 F.R.D. 242 (D. Conn. 1970).

[30]1 FEP Cases 586 (E.D. Okla. 1968).

larly situated regardless of whether they were joined as class members. Nevertheless, there are undoubtedly some situations where discrimination victims would benefit more by being included in a class suit. For example, an aggrieved person may be too docile to institute Title VII proceedings himself, but once they are instituted he may join in the litigation for affirmative relief purposes.

What if the plaintiff wins (or loses) his individual case, and because of his inadequacies as a class representative loses the class action portion of the case? It is this possibility that Rule 23 (a) (4) seeks to prevent by requiring that the representative of the class fairly and adequately protect the interests of the class. The courts have not dealt directly with this requirement in very many cases and among those courts which have specifically dealt with it, the opinions are diverse.

In *Burney v. North American Rockwell Corp.*,[31] a discriminatory discharge case, the court said it could neither assume that the plaintiff would fairly and adequately represent the interests of other Negroes who were discriminated against in such areas as job assignments, overtime, or vacations nor since the plaintiff had not been an employee for two years, that he would fairly and adequately represent current employees in the broad area of discriminatory work rules and terms and conditions of employment.

Another court, resolving this issue of adequacy of the class representation, stated that the other members of the class had selected the plaintiff as their representative[32] and thus demonstrated their faith in her ability to adequately and fairly represent them. The court held she was an adequate representative notwithstanding that her claim was not identical with the claims of all class members.[33]

Yet another court, in determining the question of adequate and fair representation, stressed the lack of collusion between the plaintiff and the defendant and the experience of plaintiff's counsel in handling racial matters.[34]

The most piercing analysis of the requirement that the plaintiff be a fair and adequate representative has come from the Fifth Circuit. Justice Godbold pointed out that "an over-broad framing of the

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[31]302 F. Supp. 86 (C.D. Cal. 1969), *accord,* Bradley v. Southern Pacific Co., Inc., 51 F.R.D. 14 (S.D. Tex. 1970); Hyatt v. United Aircraft Corp., 50 F.R.D. 242 (D. Conn. 1970); Baxter v. Savannah Sugar Refining Corp., 46 F.R.D. 56 (S.D. Ga. 1968).

[32]However, it should be pointed out that consent of class members is not necessary to the maintenance of a class action. Moss v. Lane Co., 50 F.R.D. 122 (W.D. Va. 1970).

[33]Manning v. General Motors Corp., 3 FEP Cases 104 (N.D. Ohio 1971).

[34]Mack v. General Elec. Co., 329 F. Supp. 72 (E.D. Pa. 1971).

class may be so unfair to absent class members as to approach, if not amount to, deprivation of due process."[35]

Thus, if the plaintiff through his inadequacies as a representative loses on the allegations he raises, then the absent class members will have gained nothing, but will have lost their right to relief through their own action because of the doctrine of *res judicata*.

III. The Relief That May be Granted

Although *Oatis v. Crown Zellerback Corp.*,[36] settled the question, at least in the Fifth Circuit, of whether each class member must pursue his remedies before the EEOC (by holding that each member need not), there remains the question of what relief may be granted those class members who have not pursued their EEOC remedies.

There is little doubt that they are entitled to injunctive relief, but what of affirmative relief? Some courts have held they are not so entitled,[37] and others have held they are entitled to affirmative relief.[38] The latter mentioned cases are more soundly reasoned, especially *Madlock v. Sardis Luggage Co.*,[39] in which the court emphasized the duty the Act places upon the court to protect the interest of the public as well as that of the parties. Envisioned purposes of the Act are accomplished only when relief is afforded the plaintiff and all the class members. The court, using the *Miller, Jenkins,* and *Oatis*[40] decisions for its foundation, held that once a class member enters the case as a co-plaintiff, he does so on the same basis as the original plaintiff.

Aside from the reasoning in *Madlock,* it would be anomalous to say that a class member does not have to pursue his Title VII remedies in order to be included in the class, and then hold that if he does not he cannot obtain affirmative judicial relief. Such persons could not obtain relief since if they tried to re-litigate the same issues that were litigated in the class action in order to obtain affirmative relief, the defendant could raise the doctrine of *res judicata* as a defense.

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[35]Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1126 (5th Cir. 1969).

[36]398 F.2d 496 (5th Cir. 1968).

[37]Hayes v. Seaboard Coast Line R.R., 46 F.R.D. 49 (S.D. Ga. 1968); Hall v. Werthan Bag Corp., 251 F. Supp. 184 (M.D. Tenn. 1966).

[38]Bowe v. Colgate Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Madlock v. Sardis Luggage Co., 302 F. Supp. 866 (N.D. Miss. 1969).

[39]302 F. Supp. 866 (N.D. Miss. 1969).

[40]Miller v. International Paper Co., 408 F.2d 283 (5th Cir. 1969); Jenkins v. United Corp., 400 F.2d 28 (5th Cir. 1968); Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968).

Conclusion

The court decisions discussed above have established an outline for Title VII class actions. However, there are some areas in which the law is still evolving on a case by case basis. Examples are the extent of allowable expansion of the issues raised before the EEOC and what issues are or are not common to the entire class. How broad the class may be and still insure adequate representation is also an unsettled question.

At the present stage of development it may reasonably be concluded that Title VII provides that an aggrieved person may file an EEOC charge, wait sixty days, and demand from the EEOC his right to sue letter. Within thirty days thereafter, he may institute suit on behalf of himself and those similarly situated in the form of a class action. Both on his own behalf and on behalf of the class he is allowed to raise those issues which are reasonably related to and grow out of the issues raised before the EEOC. He may represent a class meeting the Rule 23 requirements. If there are questions of fact or law which are not common to the entire class, the trial court may utilize sub-classes or a special master. Injunctive relief will be granted to absent class members and affirmative relief can be granted to those class members who prove they are so entitled, regardless of whether they pursued their remedies before the EEOC.

Although the class action device is a useful tool in Title VII cases, the courts should heed the caveat not to expand the class action to the detriment of those it is seeking to help. What the court must do is make a compromise between the right of the plaintiff to bring the class action, the right of the defendant to adequately defend the law suit, the right of the court to manage the law suit and the right of the absent class members to have a representative that will fairly and adequately represent them.

Author's note: Subsequent to the submission of this article, Congress passed an amendment to Title VII known as the Equal Employment Opportunity Act of 1972, which was signed by the President on March 24, 1972, the effective date thereof. The major changes in Title VII insofar as this article is concerned are the granting of enforcement powers to EEOC and changes in the time periods applicable thereunder. Under the amendment, in cases where reasonable cause exists to believe a violation of the Act has occurred, the EEOC, or the U. S. Attorney General in cases involving states or their political subdivisions, if unable to obtain conciliation acceptable to the EEOC, may within

30 days subsequent to the filing of the charge institute an action in Federal District Court. The charging party can intervene in such action. If the EEOC, in cases where it has found reasonable cause to believe a violation of the Act has occurred, has not filed a civil action within 180 days from the filing of the charge or, if the EEOC dismisses the charge, the charging party is notified and may personally bring an action within 90 days thereafter. Under the amendment, the time for filing a charge is extended from 90 to 180 days from the date the alleged unlawful employment practice occurred, and the time for instituting a court proceeding by a charging party is extended from 30 to 90 days from notification by the EEOC.

This article, of course, will be applicable as written in all court actions filed under the original Act. It will retain its vitality in cases instituted under the amended Act since class actions will still be permitted. Also, the author foresees a substantial transition period for the EEOC, especially in view of the EEOC's bulging backlog of cases and undermanned staff. Therefore, a number of private actions should continue to be brought in the foreseeable future.

PRACTICE AND PROCEDURE IN MISSISSIPPI: AN ANCIENT RECIPE FOR MODERN REFORM

*Lawrence J. Franck**

> There is enough latent energy in the courts . . . to generate a power which will purge and dignify the legal profession not for one year only, but for all time . . . enough "inherent judicial power" to raise that profession from the place of public criticism to which it has been consigned, to that high and honorable position in public esteem which is its natural and historic birthright.[1]

To a great many Mississippi trial practitioners, the regulatory scheme of pleading and practice in Mississippi courts is a constant source of frustration. Antiquated and ill-designed for use in modern trial practice, the present hodge-podge of confusing, scattered statutes, court rules, and case decisions which embody our practice and procedural rules are sadly in need of a carefully studied and thorough reworking. From time to time there have been some minimal efforts at reform of specific deficiencies[2] and calls for a more modern, efficient system,[3] but the efforts at reform have been largely unsuccessful.[4] Indeed, there have been no significant developments in Mississippi practice and procedure for nearly half a century.[5]

The purpose of this paper is to propose a means by which the procedural aspects of Mississippi court practice can be overhauled and constantly kept in good working order. The paper assumes that there is a basic consensus on the need for such reform and does not seek to make a case for that need.[6] The proposal is a simple one: The Mississippi Supreme Court, as the state's highest judicial organ and

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[1]Dowling, *The Inherent Power of the Judiciary,* 21 ABAJ 634 (1935).

[2]*See, e.g.,* Griffith, *The New Mississippi Civil Practice Act — Its Background and Effect,* 20 Miss. L.J. 1 (1948).

[3]Triplett, *Hocus Pocus Legal Procedure,* 16 Miss. L.J. 9 (1943); Fant, *Procedural Reform in Mississippi,* 34 Miss. L.J. 40 (1963); Ethridge, *Improving the Machinery of Justice,* 37 Miss. L.J. 506 (1966); Patterson & Patterson, *A Plea For Procedural Reform in Mississippi,* 42 Miss. L.J. 293 (1971).

[4]Fant, *supra* note 3, at 40.

[5]Ethridge, *supra* note 3, at 508.

[6]*See* Patterson & Patterson, *supra* note 2, for a catalogue of deficiencies which cry out for reform of the entire system.

a body constitutionally vested with the "judicial power"[7] of the state, has inherent power to establish by appropriate rules the practice and procedure which shall govern the course of litigation in the courts of Mississippi.

Heretofore Mississippi practice and procedure has been largely regulated by statute,[8] and most efforts at reform have been expressed in terms of statutory improvements.[9] Occasionally suggestions have been put forth for the "vesting" of the rule-making power in the Supreme Court,[10] but the proponents of these suggestions have always considered that such a step requires a constitutional amendment specifically vesting such power in the court,[11] or a statute authorizing the court's assumption of the rule-making function.[12]

As was stated above, the thesis to be advanced here is that the court inherently possesses the power to establish rules of pleading, practice, and procedure; consequently, there is no need for a constitutional amendment or even a statute "vesting" it with that power. The power has been dormant for quite a long time; so it might be

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[7]MISS. CONST. art. 6, § 144 (1890).

[8]Court rules and case decisions have largely been used to fill voids left in the statutory scheme. *See, e.g.,* Miss. Supreme Court Rules; Uniform Rules For the Circuit Courts of Mississippi (1971).

[9]*See, e.g.,* the reports of various study committees of the Mississippi State Bar Association reported in 35 MISS. L.J. 546-547 (1964); 37 MISS. L.J. 600-601 (1966); 38 MISS. L.J. 594 (1967). But even these suggested improvements have not always been well received, even by the Bar itself. In 1967 the recommendations of the study committee were not adopted by the Bar. 38 MISS. L.J. 594 (1967).

[10]A Bar committee rejected such a proposal in 1944, preferring to keep the rule-making function in the legislature, on the dubious grounds that this would be more "democratic." 16 MISS. L.J. 335, 336 (1944). *See* Ethridge, *supra* note 3.

[11]Ethridge, *supra* note 3.

[12]In 1949 the Committee on Procedural Reform reported to the Bar that it recommended passage of a statute "vesting in the Supreme Court of . . . Mississippi the power to prescribe . . . general rules of pleading, practice, and procedure in civil cases in the chancery, circuit, and county courts of the state. . . ." 20 MISS. L.J. 507 (1949).

In its report, the short-lived Judiciary Commission took the same approach. It recommended passage of a specific statute which would provide: "The Supreme Court shall have the power to prescribe from time to time, by general rules, the forms of process, writs, pleadings, motions, rules of evidence, and the practice and procedure of the circuit, chancery, and county courts of this State in civil actions." *Report of the Mississippi Judiciary Commission,* app., 18 (1970). The report also noted that "[p]leadings, practice and procedure should be designed . . . to get to the true and controlling issues in cases, to ascertain the facts which determine the law, and to reach a prompt decision." *Id.* at 15.

argued that the court has abdicated its rule-making prerogative in favor of legislative pre-emption of that field. Historically and analytically, however, the power is the court's. It can and should retrieve that power.[13]

No attempt will be made herein to survey all of the numerous court decisions which have considered one aspect or another of judicial regulation of court practice and procedure.[14] Since this paper is frankly designed as a polemic, its purpose will be to demonstrate the validity of its stated position.

I. Sources of the Rule-Making Power: History and Analysis

In England the power to establish rules of practice and procedure has gone through several distinct and well-defined stages of development. In its earliest stages pleadings were oral, and other matters of practice and procedure were established gradually according to the prevailing custom in the court. Later more formal rules were established by the courts to govern procedure in cases before them.[15] Still later the legislative arm of the government began to assert control over court procedure, but by the time of the adoption of most American state constitutions, the power in England had been restored to the courts.[16]

In America much emphasis was placed upon the division of powers among the several branches of the government, and it was insisted that each branch remain free from intrusions upon its perogatives by either of the other governmental arms. The Mississippi Constitution follows this familiar pattern. Thus it provides:

> The powers of the government of the state of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to-wit: those which are legislative to one, those which are judicial to another, and those which are executive to another.[17]

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[13]How this might be accomplished is considered in section IV., *infra*.

[14]*See* Annot., 110 ALR 22 (1937), 158 ALR 705 (1945).

[15]No formal rules of practice existed earlier than the Fourteenth Century. Prior to that they were established only by court decision in particular cases. Tyler, *The Origin of the Rule-Making Power and Its Exercise by Legislatures*, 22 A.B.A.J. 772, 773-74 (1936).

[16]Pound, *The Rule-Making Power of the Courts*, 12 A.B.A.J. 599 (1926). Dean Pound suggests several reasons for these historical developments in England, which, for purposes of this paper, are largely academic.

[17]Miss. Const. art. 1, § 1 (1890).

> And again:
> No person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging to either of the others.[18]

These provisions have been a part of the Mississippi constitutional fabric from the beginning.[19]

Since our fundamental notions of law have been drawn from our parent realm, England,[20] it is important that we look to the situation that existed in that country at the time of the adoption of the American constitutions in order to determine where, according to the principles prevailing there, the rule-making power had its source.[21] It is clear that at the time of the adoption of our own constitutions, the power to make rules of practice "was and had been for centuries in the King's courts at Westminster."[22] Those were circuit courts, but the practice established by the judges at Westminster was followed wherever the courts were held.[23]

That the English courts freely regulated their own practice by rules established by them may be clear. But what can be said with respect to the exercise of regulatory authority by a soverign's highest court over the practice in constitutionally inferior courts? Again, it seems that history is decisive. In England the practice of courts of assize and nisi prius was governed by general rules established by the courts at Westminster, even though the former were independent court systms.[24]

From the foregoing it seems certain that when the Mississippi constitutions were adopted, the long settled practice in England was that the rule-making power was a judicial one.[25]

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[18]MISS. CONST. art. 1, § 2 (1890).

[19]MISS. CONST. art. 2 §§ 1 & 2 (1817); MISS. CONST. art. 2, §§ 1 & 2 (1832); MISS. CONST. art. 3 § 1 (1869).

[20]GRIFFITH, MISSISSIPPI CHANCERY PRACTICE § 1 (2d Ed. 1950).

[21]The dividing line among the several governmental powers for determining the proper source of a particular power is largely determined by historical criteria. Pound, *supra* note 15, at 601.

[22]*Id.* at 601.

[23]*Id.*

[24]*Id.*

[25]A somewhat different perspective is presented in Tyler, *supra* note 15 at 773-74 (1936). The argument is there advanced that since in England *all* power ultimately rested in the King, the English governmental system was "one of fused and not divided powers." *Id.* at 773. Further, since it appears that in establishing rules having general effect, "it was . . . occasionally necessary to resort to acts of parliament. . . ." *Id.* at

Despite these historical imperatives, the early American experience was largely a resort to legislative action for the establishment of practice and procedure in the courts. Dean Pound has suggested several reasons for this development.[26] Prior to the Civil War the prevailing notion in America was one of legislative supremacy. Because they were conceived (and conceived themselves) as wielding "the general powers of the sovereign people,"[27] legislatures were prone to assume that "whatever the sovereign people could do, by virtue of their sovereignty, they could do through legislation."[28] Thus, even though the constitutional imperatives of a separation of powers was formally embodied in most, if not all, constitutions, in practice the legislature was looked upon as supreme. For this reason, Dean Pound suggests, as pressures for procedural reform emerged, it was natural to look in the direction of legislative action.[29]

Moreover, the early system of legal education in this country was basically a system of apprenticeship. That system was "before all else a training in the details of local procedure."[30] Since this form of legal education led lawyers to attach primary importance to the procedural, rather than the substantive, aspects of the law, it was natural for them to expect the legislature to control the procedural aspects of the law as well as its substantive provisions.[31]

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773. One must "hesitate to exclude the legislature constitutionally from all participation in creating rules of practice." *Id.* at 774

The point, however, is not *how* English courts came to the power; but rather, that when the American (and Mississippi) constitutional systems evolved, they drew on the English practice *as it then existed.* And at that time, it was established that in England, procedural rule-making was a judicial function.

[26]Pound, *supra* note 16.

[27]*Id.*

[28]*Id.*

[29]*Id.* at 600.

[30]*Id.* at 600-01.

[31]*Id.* at 601. *See* Tyler, *supra* note 15. It is there argued that as pressure for modernization of court procedures mounted in America, there was, unlike in England, no "centralized bench and bar at which to point an accusing finger." Tyler, *supra* note 15, at 775.

It has been stated that the adoption by the legislative branch of codes of practice and procedure for the judicial branch shows "either that the courts have abdicated their rule-making power and surrendered it to the Legislative Department of Government, or that the Legislative Department has reached out and appropriated the power regardless of the court's desire in the matter." Marvel, *Some Problems of Bench and Bar,* 2 Miss. L.J. 188, 191 (1929).

In Mississippi the common law rules of pleading were unchanged by the state's first legislative code.[32] However, lawyers of the day were apparently adroit at using the common law practices for all sorts of dilatory tactics to the extent that it "never seemed to occur to them once as a possible conception" that "justice had anything to do with trying cases."[33] By 1850 the call had been sounded for reform of these procedures. The governor called for the abolition of common law forms of actions, pleading, and practice because "[t]he administrations of justice in our circuit courts is, in my opinion, greatly impeded and rendered litigious and burdensome" by those practices.[34] The result was the adoption of Chapter 4, Laws of 1850, which charted a new course in the rules of pleading in this state.[35] Thus, Mississippi showed itself susceptible to the philosophy of the day,[36] and the control of practice and procedure in our courts has been principally a matter of legislative concern since that time.

There was a similar historical development in regard to equity practice. Originally the practice involved petitions addressed directly to the king and later to his chancellors.[37] The chancery courts developed their own processes and borrowed others from the common law and the civil law.[38] Chancery courts established in colonial America adhered closely to the rules and practices prevailing in their counterparts in England.[39] Moreover, the American courts of equity relied heavily upon the practice announced by Chancellor Kent of New York for their procedural processes.[40]

Judge Griffith points out that in Mississippi the chancellors, "after setting forth, as the procedure of the court, those particular rules required by our own separate situation,"[41] specifically provided by rule that the mode of procedure should conform to the practice in New York's equity courts wherever feasible.[42]

Until 1856 the body of rules of practice in Mississippi chancery courts, other than those taken from the practice in New York and

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[32]Griffith, *supra* note 2.

[33]Baldwin, *The Bench and the Bar,* as quoted in Griffith, *supra* note 2, at 2.

[34]Griffith, *supra* note 2, at 3.

[35]*Id.* at 4-5.

[36]Pound, *supra* note 16.

[37]Griffith, *supra* note 20, at §§ 6, 7, 9.

[38]*Id.* § 10.

[39]*Id.* § 12.

[40]*Id.* § 15.

[41]*Id.*

[42]*Id.*

from the English practice, "were prescribed and promulgated by the chancellor."[43] In that year, however, a constitutional amendment placed the exercise of chancery jurisdiction in the circuit judges of the state, and it was therefore "deemed essential to carry the rules into formal statutes."[44] Since then, the rules of chancery practice and procedure have been largely established and perpetuated by legislation.[45]

This brief review shows that legislative control of the rule-making function runs counter to the heritage to which we profess adherence and from which we claim inheritance. Curiously, too, the American experience of legislative rule-making for the judicial arm was in the ascendancy at precisely the time that in England the legislature had returned the power to the courts.[46]

Dean Pound has persuasively argued that, analytically, there is no rational basis for legislative control of the rule-making power.[47] There is no more reason to support legislative control of court procedure than there would be to support court supervision of the procedure by which the executive branch discharges its duties.[48] In Mississippi one can imagine the furor which would result if the court announced its promulgation of rules governing the manner in which committees of the legislature should carry out their affairs or proclaimed its amendment of the rules of parliamentary procedure by which the legislative branch operates. Yet that is precisely the situation that exists in this state in regard to judicial procedure. The legislature has assumed practically full control of the internal procedures by which the courts administer justice. The astonishing fact is that this usurpation of judicial power by the legislature has been meekly accepted for so long. Particularly is this so in light of the explicit command of the constitution that the division of powers between the several arms of government shall not be breached.[49] For a people whose traditions have evoked such emotional outrage over real or imagined usurpations of power by one branch of government over another in other spheres, it is little less

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[43] *Id.* § 20.

[44] *Id.* Surely the philosophy undergirding that development was the same as that described by Dean Pound, *supra* notes 26-30.

[45] Griffith, *supra* note 20, at §§ 20, 20a, 20b, 20c. There are, of course, numerous matters pertaining to chancery practice and procedure for which there is no specific legislative basis and which rest upon the judicial procedures established long ago. *See generally* Griffith, *supra* note 20.

[46] Pound, *supra* note 16.

[47] *Id.* at 601.

[48] *Id.*

[49] Miss. Const. art. 1, § 2 (1890).

than incredible that we should have so long endured the legislature's unwarranted assumption of what is, on historical and analytical bases, a clearly judicial function.

II. Sources of the Rule-Making Power: Reform and Return

Despite the early history of the rule-making power in America, recent years have witnessed a trend toward restoration of that function to the courts.[50] The arguments in favor of its residence in the hands of the judiciary have been persuasive. Nevertheless, because of the diverse ways in which this return has been accomplished, the basic question of power—the power to make rules of procedure for the judicial branch of the government—remains the core question.[51]

Obviously the state constitution must be the foundation upon which the source of that power rests.[52] In some states reform has come by means of an express constitutional grant of the rule-making power to the judiciary.[53] In other states legislation has been enacted for this purpose,[54] or the courts have assumed the function by invoking their inherent power.[55] But it will not suffice simply to categorize the status of the

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[50]Annot., 158 A.L.R. 699, 702 (1945). In twenty-four states the highest court has complete supervisory power to establish rules of civil procedure. In other states there is a conglomeration of categories into which the rule-making power may fall. In some the court may initiate rules which must have legislative approval to become effective; in others the court-made rules become effective unless the legislature disapproves them; in still others the legislature has the right to repeal or modify such rules. *See* Report No. 13, The American Judicature Society, "The Judicial Rule-Making Power in State Court Systems." The Report points out that in a minority of states the legislature must still initiate changes in rules of procedure, while in others the court cannot supervise procedural rules in inferior courts. Significantly, Mississippi is one of only three states where there is little or no centralization of rule-making power. It is this void that this paper advocates our Supreme Court should fill.

[51]Note, *The Judiciary and the Rule-Making Power,* 23 S.C.L.R. 377 (1971).

[52]21 C.J.S. *Courts* §§ 120, 122.

[53]*See, e.g.,* Hawaii Const. art. V, § 6, discussed in Lucas v. Liggett & Myers Tobacco Co., 461 P.2d 140 (Hawaii 1969); N.J. Const. art. VI, § 2 ¶ 3. Under that provision the Court held in Lichter v. County of Monmouth, 114 N.J. Super. 343, 276 A.2d 382 (1971), that "there is no room for divided authority" between the judiciary and the legislature as to the rule-making power. *See* Ariz. Const. art. VI, § 5; State v. Meek, 8 Ariz.App. 261, 445 P.2d 463 (1968); Colo. Const. art. VI, § 21; Fla. Const. art. V, § 3; Mich. Const. art. VI, § 5; N.J. Const. art. VI, § 2.

[54]*See, e.g.,* Petition of Florida State Bar Ass'n., 155 Fla. 710, 21 So. 2d 605 (1945); Pan American Petroleum Corp. v. Texas Pac. Coal and Oil Co., 340 S.W.2d 548 (Tex. 1960); *In re* Constitutionality of Section 251.18, Wisc. Statutes, 205 Wis. 41, 236 N.W. 717 (1931).

[55]Nasif Realty Corp. v. Nat'l. Fire Ins. Co., 107 N.H. 267, 220 A.2d 748 (1966); Craft v. Commonwealth, 343 S.W.2d 150 (Ky. 1961).

rule-making power in this fashion. Because a number of courts have given their attention to this question in a variety of situations, an analysis of some of these decisions is important to the development of the position advocated herein.

The constitutional underpinning for the assertion of an *inherent* power in the judicial branch to assume the rule-making function rests upon the separation of governmental powers. It has been stated that this is the most cogent argument which supports this position.[56] Thus, in *Craft v. Commonwealth*[57] the Kentucky court stated:

> It has generally been recognized that courts (even without express authority given by the constitution, statute, or rule of a supreme court of a state) have inherent power to prescribe rules to regulate their proceedings and to facilitate the administration of justice.
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> When we say that an express constitutional grant of rule-making power is unnecessary we do not mean that the rule-making power does not flow from that instrument. The fountain source of that power is in the act of division of powers among the three branches of the government. . .and the grant of judicial power to the courts by the constitution carries with it, as a necessary incident, the right to make that power effective in the administration of justice.[58]

The court also stated:

> Thus, the circuit court and this court have the power to formulate rules for the fair administration of justice aside from additional grant or limitation by the legislature.[59]

In the earlier decision of *Burton v. Mayer,*[60] the Kentucky Supreme Court had recognized that there is an area of *coöperation* between the legislative and the judicial branches of government, such that the courts are willing to accept legislative assistance in making the judicial process more effective. The Kentucky Court was not willing to accept, however, "the right of legislative *dominance* in matters of this kind."[61]

So long as rules of practice fixed by the legislative branch accord with the proper and effective administration of justice, the court was willing to accept them. But where legislative enactments in this field

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[56] *The Judiciary and the Rule-Making Power, supra* note 51 at 382.
[57] 343 S.W.2d 150 (Ky. 1961).
[58] *Id.* at 151.
[59] *Id.* at 152.
[60] 274 Ky. 263, 118 S.W.2d 547 (1938).
[61] 118 S.W.2d at 549.

impede the administration of justice or prove unworkable "the duty undoubtedly rests on the courts to draw upon the reserve of their inherent power, not in the assertion of a domination over other co-ordinate branches of government, but in co-operation with the legislative and executive branches to carry out the purposes of the constitution."[62]

Perhaps no court has stated the inherent judicial power in as forceful terms as has the New Hampshire court. In *Garabedian v. Donald William, Inc.*[63] that court held that "the inherent rule-making authority of courts. . .to prescribe rules of practice. . .has an ancient lineage supported by consistent custom, recognized by statute and enforced by numerous judicial precedents."[64]

The Arizona constitution specifically vests the rule-making power in the judiciary,[65] but, the Arizona court has recognized its inherent power even without that express grant. In *Heat Pump Equipment Co. v. Glen Alden Corp.*[66] it was held:

> Rules of practice and procedure governing the courts have been considered in this State to be essentially judicial in nature, with the power to make them inherent in the courts on the basis of the State Constitution which distributes the powers of government among the legislative, executive and judicial departments. . .and vests the judicial power of the state in the courts.[67]

Discussion of the relative roles of the legislative and judicial branches in regard to judicial administration has arisen in a number of cases involving legislation transferring the rule-making function to the courts. It is an anomaly that many of these statutes have been attacked on the premise that they involve an unconstitutional delegation of *legislative* authority. Such attacks have uniformly been rejected. One of the leading decisions in this regard is *In re Constitutionality of Section 251.18,* Wis.

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[62]*Id.* at 549-50.

[63]106 N.H. 156, 207 A.2d 425 (1965).

[64]207 A.2d at 426. This same language was employed in Nasif Realty Corp. v. Nat'l. Fire Ins. Co., 220 A.2d 748, 749 (N.H. 1966); and in Heiberger v. Clark, 148 Conn. 177, 169 A.2d 652 (1961), it was stated that "[i]rrespective of legislation, the rule-making power is in the courts." 169 A.2d at 656. Just recently, the New Hampshire court has stated that its general superintendence of the courts of that state rests upon its common law powers; the statute concerning its supervisory control merely "confirms" its inherent powers. *In re* Mussman, 286 A.2d 614 (N.H. 1972).

[65]ARIZ. CONST. art. VI, § 5.

[66]93 Ariz. 361, 380 P.2d 1016 (1963).

[67]*Id.* at 1017.

Statutes.[68] A Wisconsin statute provided that the supreme court should promulgate rules of pleading, practice, and procedure in all courts of the state. The statute was attacked as being an unconstitutional delegation of the legislative power. In discussing the separation of powers, the court said:

> It is, of course, elementary that we are committed by Constitution to the doctrine of separation of powers. It is also fundamental and undeniable that no one of the three branches of government can effectively delegate any of the powers which peculiarly and intrinsically belong to that branch.[69]

The court recognized that it is practically impossible to maintain an absolutely pure division of these powers among the several branches of government.[70] It also held that what constitutes the judicial power "is to be determined in the light of the common law and of the history of our institutions as they existed anterior to and at the time of the adoption of the constitution."[71] After reviewing the history of Wisconsin's constitutions, the court held:

> From the foregoing, it is concluded that the power to regulate procedure, at the time of the adoption of the Constitution, was considered to be essentially a judicial power, or at least not a strictly legislative power, and that there is no constitutional objection to the delegation of it to the courts by the Legislature.[72]

Other courts, discussing somewhat similar statutes, have stated even more strongly the inherently judicial nature of the rule-making power. In *State v. Roy*[73] the Supreme Court of New Mexico held that such a statute was a "mere abdication or withdrawal from the rule-making field" by the legislature, and that such statute was "not a delegation of power."[74]

In like manner, a statute authorizing the Supreme Court of Idaho to prescribe general rules of practice and procedure for all courts in the

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[68]204 Wis. 501, 236 N.W. 717 (1931).

[69]*Id.* at 718.

[70]*Id.*

[71]*Id., citing* State v. Harmon, 31 Ohio St. 250 (1878).

[72]236 N.W. 717, 720-21 (1931). The Court cited Hanna v. Mitchell, 202 App.Div. 504, 196 N.Y.S. 43, 51 (1922), where is was said: "The power to make rules governing the practice and procedure in the courts is a judicial, and not a legislative, power."

[73]40 N.M. 397, 60 P.2d 646 (1936).

[74]40 N.M. 397, 60 P.2d 646, 660 (1936). The court further stated that "Whether the legislative branch of the government was ever rightfully in the rule-making field, or was a mere trespasser or usurper, need not be now determined." *Id.* To the same effect is Burney v. Lee, 59 Ariz. 360, 129 P.2d 308 (1942).

state was held in *R.E.W. Construction Co.* v. *District Court of Third Judicial District*[75] not to be a delegation of power. The court said:

> It is thus our conclusion that the legislature in enacting the provisions of Chapter 90, Session Laws of 1941, was not delegating legislative power to the Supreme Court, but as is stated in the first section of the act, *the legislature was recognizing the inherent power of the Supreme Court in the area of rule-making procedure in all courts.*[76]

The rationale of these and similar decisions is clear. When the constitution places the judicial power in the judicial branch of the government, that grant of judicial power carries with it the right to make that power effective, and this includes the adoption of rules of practice and procedure[77] at least for constitutional courts.[78] This is primarily a judicial function.[79]

In *Adams* v. *Rubinow*[80] the Connecticut court drew a sharp distinction between the legislature's right to establish rules for statutory courts and the court's power to govern constitutional courts.

> The effect of the development in the understanding of the true meaning of the constitutional provision for separation of powers. . .as far as rule making is concerned, is that the General

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[75]88 Idaho 426, 400 P.2d 390 (1965). The Idaho constitutional provisions are strikingly similar to our own. IDAHO CONST. art. 2 § 1.

[76]88 Idaho 426, 400 P.2d 390, 397 (1965). *See also* Allen Steel Supply Co. v. Bradley, 89 Idaho 29, 403 P.2d 859 (1965). The court again characterized the statute as a recognition of "the inherent power of the Supreme Court to make rules governing procedure in all courts of this state. . . ." *Id.* at 860.

In McCormick v. Vigo County High School Building Corp., 226 N.E.2d 328 (Ind. 1967), the court referred to its "inherent power" and said of such a statute that its purpose was to "remove any apparent conflict" between the judicial and legislative power. *Id.* at 330.

[77]Burton v. Mayer, 274 Ky. 263, 118 S.W.2d 547 (1938).

[78]Adams v. Rubinow, 157 Conn. 150, 251 A.2d 49 (1968). *See The Judiciary and the Rule-Making Power, supra* note 51 at 380, n. 9.

[79]*In re* constitutionality of Section 251.18, Wis. Stat., 204 Wis. 501, 236 N.W. 717 (1931); Burton v. Mayer, 274 Ky. 263, 118 S.W.2d 547 (1938); People v. Loeb, 17 Ill. 2d 287, 161 N.E.2d 325 (1959): "This court has *inherent power* to make rules governing the practice in inferior courts. . . . The inherent power of courts to make suitable rules consistent with constitutional safeguards is universally recognized." 161 N.E.2d at 332 [emphasis added]. Indeed Dean Wigmore has taken the position that any legislative attempt to regulate court procedure is absolutely void. Wigmore, *All Legislative Rules For Judiciary Procedure are Void Constitutionally,* 23 ILL. L.REV. 276 (1929). He there argues that the "general (judicial) power is a power to do all that courts have to do, i.e., a power to regulate their own procedure." 23 ILL. L. REV. at 277.

[80]157 Conn. 150, 251 A.2d 49 (1968).

> Assembly has no power to make rules of administration, practice or procedure which are binding on either of the two constitutional courts and that any attempt on its part to exercise such power is dependent for its efficacy, upon the acquiesence of the the constitutional court involved.[81]

But as regards courts which the legislature has constitutional authority to establish (or abolish):

> The General Assembly has the power to make reasonable rules of administration, practice and procedure provided that they do not significantly interfere with the orderly operation of the court while it remains in existence as a court.[82]

While the legislature in Mississippi has undertaken the control of practically all aspects of the practice and procedure of the constitutional and statutory courts, the supreme court has not hesitated in its decision to graft its own notions of proper practice upon the statutory language. Thus, while the statute governing declarations in circuit court requires only that the pleading contain a "statement of the facts . . . in ordinary and concise language,"[83] the court has adhered to the common law rule which prohibited the joinder of actions sounding in tort and in contract.[84] Likewise, although the governing statutes seem patently clear in providing that when the venue is improper, the court should transfer the case to a proper county upon the application of *any* defendant,[85] the court has vacillated on the question whether corporations have a right to a change of venue.[86] Numerous other examples could be cited

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[81] *Id.* at 56.

[82] *Id.* The distinction is important. Under the federal constitution, the judicial power is vested "in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish." U.S. CONST. art. III, § 1. Thus, under the rationale of *Rubinow,* it is clear why it required congressional action to authorize the Supreme Court to promulgate the Federal Rules of Civil Procedure. *See* Wayman v. Southard, 22 U.S. (10 Wheat.) 1 (1825). *Cf.* Harris v. Nelson, 394 U.S. 286 (1969).

[83] MISS. CODE ANN. § 1464 (1956).

[84] Town of Hazlehurst v. Cumberland Tel. and Tel. Co., 83 Miss. 303, 35 So. 951 (1904). *See* Casey, *The Form and Content of Pleadings,* 30 MISS. L.J. 373, 382 (1959).

[85] MISS. CODE ANN. §§ 1433, 1441 (1956).

[86] Prior to the enactment of § 1441, the Court held that a corporation had no right to a change of venue. Plummer-Lewis Co. v. Francher, 111 Miss. 656, 71 So. 907 (1916); Morrimac Veneer Co. v. McCalib, 129 Miss. 671, 92 So. 817 (1922). After the statute was enacted, the court ignored it, adhering to the old rule, Forman v. Miss Publishers Corp., 195 Miss. 90, 14 So. 2d 344 (1943); Ainsworth v. Blakeney, 232 Miss. 297, 98 So. 2d 880 (1957), until the decision in New Biloxi Hospital v. Frazier, 245 Miss. 185, 146 So. 2d 882 (1962), where the statute was correctly applied. Later, the court reverted to its earlier rule in Miss. Rice Grower's Ass'n (A.A.L.) v. Pigott, 191 So. 2d 399 (Miss. 1966), which did not even mention either the statute or *New Biloxi.*

but these are specifically noted only to illustrate the point.[87]

More importantly, two significant decisions of the Mississippi Court clearly show that it is closely attuned to its inherent power in the rule-making field. In *Gulf Coast Drilling & Exploration Co.* v. *Permenter,*[88] the court considered the validity of a circuit court rule requiring briefs on appeals from the Workmen's Compensation Commission to be filed within a certain time. It was argued that since the statute[89] authorized the circuit court only to affirm or remand such appeals, the court had no authority to dismiss an appeal for failure to follow its procedural rules. Rejecting that contention, the court held that the circuit court had "ample constitutional, statutory and inherent powers"[90] to establish such rules.

> We hold that the circuit courts are intermediate courts of appeal in workmen's compensation cases just as they are in county court cases. As such they are governed by the same rules and *endowed with the same powers applicable to courts of appeal under appellate tradition.*[91]

Permenter was based largely on the court's decision in *Southern Pacific Lumber Company* v. *Reynolds.*[92] That case involved the validity of a similar circuit court rule governing appeals from county court. In upholding the rule, Chief Justice Ethridge had taken great pains to rest the decision specifically and primarily upon the court's inherent powers.

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[87]*See, e.g.,* Evans v. Central Service and Supply Co., 226 So. 2d 616 (Miss. 1969) (pleading a claim for materialman's lien may be joined with alternative contract claim); Bush v. City of Laurel, 215 So. 2d 256 (Miss. 1968) (authorizing demurrer to be filed in answer); Paulk v. Housing Authority of City of Tupelo, 195 So. 2d 488 (Miss. 1969) (trial court has considerable discretion in matters pertaining to discovery); Merchants Grocery Co. v. Merchants Trust & Banking Co., 119 Miss. 99, 80 So. 494 (1919) (requiring interrogatories under § 1712 to be served by sheriff under § 1876. *Accord,* Robinson v. Hemphill, 229 So. 2d 827 (Miss. 1969). A 1971 amendment to § 1876 appears to remove that requirement; the amendment, awkwardly worded, seems to authorize service in the manner provided by Fed. R. Civ. P. 5. *See* 2 Moore's Federal Practice ¶ 5.09 (2d ed. 1965), as to proof of due service of pleadings and papers subsequent to the complaint; Richard v. Hartford Fire Insurance Co., 256 So. 2d 502 (Miss. 1971), (permitting pleadings which included the declaration, an answer, a replication, and, apparently, a rejoinder. The court merely noted that no question was raised concerning the propriety of the pleadings).

[88]214 So. 2d 601 (Miss. 1968).

[89]MISS. CODE ANN. § 6998-26 (1956).

[90]214 So. 2d at 602.

[91]*Id.* at 603.

[92]206 So. 2d 334 (Miss. 1968).

The opinion states:

> The circuit court has ample power to promulgate rules pertaining to appeals to it from the county court. *There are two sources or foundations for the rule-making power of the circuit court. First, it is a constitutional court, with the inherent power to make rules for the efficient and expeditious disposition of its judicial business.*[93]
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>
> *The phrase "judicial power" in section 144 of the Constitution includes the power to make rules of practice and procedure,* not inconsistent with the Constitution, for the efficient disposition of judicial business. (Emphasis added.)
>
> An additional source of the circuit court's power to promulgate the rule in question is Mississippi Code 1942 Annotated section 1664. . . .[94]

The significance of this opinion cannot be overstated. In the first place, as noted above, the court very carefully rested its decision primarily upon the "inherent power" flowing from the constitutional grant of judicial power. Almost as an afterthought, the rather ambiguous statutory authority was mentioned. The implications are clear. Perhaps even more significantly, Justice Etheridge went out of his way to demolish an unfortunate remark by the court in *Yazoo & M.V.R.R.* v. *Kirk*.[95] In *Kirk* the court had said, on suggestion of error, that the rules of the Supreme Court, adopted in 1910, "have no application to the practice or procedure in other courts. . . . This court has no authority to prescribe rules for the government of trial courts, and has never attempted to usurp such power."[96] There was no citation of authority and no discussion to support this statement.

In a footnote in *Reynolds* Justice Ethridge discussed the constitutional prohibition against usurpation by one branch of the state government of the functions proper to other branches and stated:

> The instant case does not involve any issue concerning the Supreme Court's power to make rules of practice for trial courts. *Nor is Yazoo & M.V.R.R.* v. *Kirk,* 102 Miss. 41, 56, 58 So. 710, 834 (1912), *relevant on that question,* where on suggestion of

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[93] *Id.* at 335 (emphasis added).

[94] *Id.* at 335-36. Section 1664 provides:

Each court . . . shall also have power to arrange the business therein in a convenient manner, and to establish from time to time, rules and orders for the conducting of suits and pleadings and respecting all matters to be done in term time or in vacation not repugnant to law.

[95] 102 Miss. 41, 56, 58 So. 710, 834 (1912).

[96] *Id.*

> error the court held only that the statute of limitations must be specially pleaded. *Kirk* merely commented that the then existing Supreme Court rules had no application to practice in lower courts, as was manifest from their language.[97]

There followed several citations, including the articles by Pound[98] and Tyler[99] and *R.E.W. Construction Co.* v. *District Court of Third Judicial District,*[100] one of the leading cases declaring the inherent power of a state supreme court to regulate the practice and procedure in *all* courts of the state.

The conclusion seems inescapable that the court utilized *Reynolds,* in itself a rather insignificant and probably unsuspecting carrier, as a vehicle to establish firmly that in Mississippi the courts are confident of their inherent rights to control practice and procedure as a natural consequence of the grant to the judiciary of the judicial power[101] and to remove *Kirk* as a potential obstacle to the supreme court's assertion of a general rule-making prerogative.

As stated at the outset, the time is now ripe for the assertion and implementation of that prerogative. From the foregoing discussion, it is apparent that the constitutional grant of the judicial power is entirely sufficient to authorize the Supreme Court of Mississippi to promulgate general rules of pleading, practice, and procedure for itself and the trial courts of this state. To undertake that step will require considerable judicial foresight and courage. Nevertheless, given the prevailing conditions, it is submitted the Court should accept its status as an equal and fully coordinate branch of the government[102] and should assert its historic function in respect to the rule-making power.

III. Scope of The Rule-Making Power

It is one thing to establish the inherent power of the judiciary to promulgate rules of pleading, practice, and procedure for the judicial system; it is quite another matter to establish the scope of that power. It has been well argued, however, that this is the heart of the matter.[103]

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[97]206 So. 2d at 336 (emphasis added).

[98]Pound, *supra* note 16.

[99]Tyler, *supra* note 15.

[100]88 Idaho 426, 400 P.2d 390 (1965).

[101]*Cf.* Uniform Rules of the Circuit Courts (1971) and Supreme Court Rule 42, which gives that court's blessing to one of the more crucial circuit court rules. *But see, infra* note 128.

[102]Miss. Const. art. I, §§ 1 & 2 (1890).

[103]Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making,* 55 Mich. L.Rev. 623 (1957).

It has been recently suggested that the scope of the rule-making power is largely defined by the elusive boundary between procedure and substance and that the tendency of the courts has been to proceed on an *ad hoc* basis, rather than to formulate abstract definitions of the difference.[104] In Mississippi discussions of the need for reform have centered largely on the areas of pleading,[105] discovery,[106] third-party practice,[107] rules of evidence,[108] and forms of process and writs.[109]

Broadly stated rules of court cannot affect substantive law[110] and should be directed toward control of court procedure and matters of judicial administration.[111] In *State* v. *Gibson Circuit Court*[112] the court said that "laws which fix duties, establish rights and responsibilities among and for persons, natural or otherwise, are substantive in character, while those which merely prescribe the manner in which such rights may be enforced in a court are procedural."[113]

"Rules of practice and procedure are designed to secure the justice of the law;"[114] they involve the "judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[115] However, merely because a procedural matter involves a *substantial* matter does not render it *substantive* within the context of the boundary between the two concepts.[116]

Joiner and Miller[117] have proposed a "sensible" division between those matters which ought to be within the control of the legislative branch and those that are properly the subject of the judicial rule-making function. The division is dependent upon whether the matters involve primarily questions of important public policy, in which case they are properly of legislative concern, or whether they relate primarily to

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[104]*The Judiciary and the Rule-Making Power, supra* note 51, at 387-88.

[105]Fant, *supra* note 3; Patterson & Patterson, *supra* note 3.

[106]Patterson & Patterson, *supra* note 3.

[107]*Id.*

[108]*Report of the Mississippi Judiciary Commission,* 17 (1970).

[109]*Id.*

[110]Richey v. Richey, 389 S.W.2d 914 (Ky. 1965).

[111]*The Judiciary and the Rule-Making Power, supra* note 51, at 385.

[112]157 N.E. 2d 475 (Ind. 1959).

[113]*Id.* at 478.

[114]Dogan v. Cooley, 184 Miss. 1067, 185 So. 783, 789 (1939).

[115]Heat Pump Equip. Co. v. Glen Alden Corp., 93 Ariz. 361, 364, 380 P.2d 1016, 1017 (1963). *See* Mississippi Publishing Corp. v. Murphree, 326 U.S. 438 (1946); Sibbach v. Wilson & Co., 312 U.S. 1 (1941).

[116]Sibbach v. Wilson & Co., 312 U.S. 1 (1941).

[117]Joiner & Miller, *supra* note 103.

the effective and orderly administration of justice — the dispatch of the business of the courts — in which case they are properly the subject of the judicial rule-making power.[118] Questions relating to the creation of courts, their organization, the salaries of their officials, and the subjects over which they can exercise jurisdiction are all matters involving important policy considerations and should be under the control of the legislative branch.[119] Similarly, the length of the period of limitations in various cases primarily involves policy considerations, rather than the orderly dispatch of the judicial business, and is therefore subject to legislative action.[120]

On the other hand, the method of commencing an action, the form, content and amendment of pleadings, the joinder of parties and causes of action, counterclaims, crossclaims, third-party practices, and intervention are all matters directly related to the orderly dispatch of litigation and are therefore within the judiciary's power to control.[121]

Further, while there are some constitutional limitations as to what constitutes effective notice, within those limits the form, content and manner of service of process should be matters of judicial, not legislative, concern, since they go solely to the orderly administration of the judicial business.[122] Thus, in *Heat Pump Equipment Co. v. Glen Alden Corp.*,[123]

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[118]Joiner & Miller, *supra* note 103, at 644.

[119]*Id.* at 644-45.

[120]*Id.* at 645.

[121]*Id.* at 646-48. *See* FED. R. CIV. P., 8, 12, 13, 14, 15, 17, 19, 20, & 24. *Cf.* Shoemake v. Federal Credit Co., 188 Miss. 683, 192 So. 561 (1940), declaring that since intervention was unknown to the common law, it is "permissible only when authorized by a statute." *Id.* at 689, 192 So. at 562. This sort of judicial denigration of the judicial power to fashion modern techniques to deal with judicial procedures is the primary obstacle to procedural reform.

[122]Joiner & Miller, *supra* note 103, at 646-647.

[123]93 Ariz. 361, 380 P.2d 1016 (1963).

The rationale is that the legislature should decide the policy question of what acts are sufficient within the state to subject a non-resident to suit in that state. Once that determination is made, however, it is for the court to prescribe by rule the method by which process shall be served.

The Mississippi legislature, however, has expended a vast amount of energy in making elaborate provisions for the designation of various state officials, usually the Secretary of State, as the "appointed" agent for service of process for various non-residents and in specifying the method by which service upon such official shall be made in order to subject the desired defendant to the jurisdiction of the Mississippi courts. *See, e.g.,* MISS. CODE ANN. § 379 (1956) (contractors' bonds); § 1686 (owners of perishable commodities); § 1866-02 (carnivals, circuses, fairs); § 4560-117 (processor, distributor, manufacturer or seller of perishable fresh milk products); § 5000-23 (applicators of hormone-type herbicides); § 6647 (suppliers of school textbooks); § 8496-27

the court held that the method of effectuating service of process extra-territorially when a non-resident had committed an act subjecting him to suit in the forum state was a procedural matter and therefore subject to the rule-making power of the court.

By the same analysis pre-trial discovery is clearly a subject for judicial control through the rule-making power,[124] for fact finding is *the* function which almost all court procedures are designed to accomplish. Such was the specific holding in a recent New Jersey decision.[125] Other matters related to the *method* by which courts shall perform their functions obviously seem to be within the reach of the rule-making power.[126] The method by which cases are continued or dismissed,[127] the manner of instructing juries,[128] most questions of the admissibility of

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(boat operators); § 9054-30 (recipients of medical education scholarships); § 5198.7 (banks and trust companies acting as executors or administrators); § 5309-230 (corporations authorized to transact business); § 5287.5 (investors); § 5309-23 (corporations which fail to appoint registered agent); § 5309-234 (corporations which withdraw from State); § 5319 (non-profit corporations); § 5342 (domesticated corporations); § 5364 (investment companies which sell securities); § 5372 (dealers in securities); § 5595 (burial associations); § 5639 (a) (certain insurance companies); § 5672 (indemnity and guaranty companies); § 5674 (6) (insurance brokers and agents); § 5705-04 (unlicensed insurers); § 5760 (fraternal societies); § 5801 (mutual insurance companies); § 5808 (reciprocal insurers); § 9352-61 (motorists). And *see* §§ 1437 and 1438, dealing generally with non-residents who commit torts or breach contracts in this State. *But see* § 2674-16 authorizing extra-territorial personal service on importers of obscene material. Service may be made by any person over the age of 21, who is not a party to the action.

If the view expressed herein were adopted, the court might well dispense with the "seemingly empty ritual" of requiring service upon a state official as the "agent" of the non-resident defendant, and merely require that process be served directly upon the non-resident, either personally or by mail. *See* 2 Moore & Friedman, MOORE'S FEDERAL PRACTICE ¶ 4.41-1[3] (2d ed. 1965). Since due process considerations require that the method of service make it reasonably probable that the non-resident will be notified of the suit against him, the intermediate step of service on a state official is, alone, meaningless. *See* Wuchter v. Pizzutti, 276 U.S. 13 (1928); Hess v. Pawloski, 274 U.S. 532 (1927). As an example of a modern long-arm statute dispensing with the requirement of service on a state official, *see* ILL. REV. STAT. ch. 110, § 17 (1957).

[124]Joiner & Miller, *supra* note 103, at 648-49. *See* FED. R. CIV. P., 26-37.

[125]Ames v. Ames, 89 N.J. Super. 267, 214 A.2d 544, 548 (1965): "Depositions are a form of discovery, and discovery falls into the field of practice and procedure. . . ."

[126]Holm v. State, 404 P.2d 740 (Wyo. 1965).

[127]Cohn v. Borchard Affiliations, 30 App.Div.2d 74, 289 N.Y.S.2d 771 (1968), holding unconstitutional a statute which attempted to set conditions precedent to the right of the trial court to dismiss cases for lack of prosecution.

[128]Joiner & Miller, *supra* note 103, at 650. This is one of the most curious areas of Mississippi practice. MISS. CODE ANN. § 1530 (1956) requires jury instructions to be in writing and prohibits the trial judge from summing up the testimony and from

of evidence,[129] the form and content of judgments,[130] and post-judgment

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commenting on the weight of the evidence. Nor may he originate any instructions, but he must depend entirely upon the parties to request them. Watkins v. State, 60 Miss. 323 (1882). In Masonite Corp. v. Lochridge, 163 Miss. 382, 141 So. 758 (1932), the court somewhat reluctantly rejected an argument that this statute unconstitutionally abridged the right of trial by jury. The decision rested on the adoption of the Constitution of 1890 with the same jury trial provisions as were contained in the earlier constitutions when cases such as *Wilson* were decided. It would seem that a much stronger argument could have been mounted on the separation of powers theory. The unique Mississippi practice of having instructions read by the attorneys rather than by the judge seems to rest upon neither statute nor decision, but only on custom. McElroy, *Procedural Aspects of Motions and Instructions,* 30 MISS. L.J. 413, 420 (1959); 1 ALEXANDER, MISSISSIPPI JURY INSTRUCTIONS, § 5 (1953).

The court has recently characterized as "unsatisfactory" our procedure governing jury instructions, Duggan v. State, 256 So. 2d 511 (Miss. 1972), but has apparently not perceived its inherent power to remedy the situation. Our strange practice regarding jury instructions typifies the illogic of our entire procedural system. In 1971 the Uniform Rules of the Circuit Courts were adopted by the Conference of Circuit Judges. Rule 14 provides that specific objections to requested instructions must be dictated into the record. Subsequently, the supreme court promulgated its Rule 42, approving Circuit Court Rule 14, and providing that the supreme court will not consider any assignment of error "based on the giving of an instruction to the jury," unless the record shows compliance with Circuit Court Rule 14. All this seems to indicate a positive and progressive, albeit small, step in the right direction. However, precisely because the supreme court has not seized the initiative and laid out a well-planned procedure for handling jury instructions, the new rules raise as many problems as they solve. While the Circuit Court Rules are called "Uniform," in fact not all circuit courts follow them. If a circuit court does not require or permit compliance with Circuit Court Rule 14, how can the supreme court enforce its Rule 42? By its terms, Supreme Court Rule 42 applies only to assignments of error based on the "giving" of instructions; one wonders why that rule does not also apply to assignments of error based on the *refusal* of instructions. The Uniform Circuit Court Rules do not, of course, apply to *county courts*. Therefore, there is no rule requiring objections to instructions to be recorded in county court cases, and, presumably, Supreme Court Rule 42 would not apply to such cases. It is submitted that this strange admixture of procedural rules has no place in a modern judicial system.

[129]Joiner & Miller, *supra* note 103, at 650-51. But the legislature may properly act when policy considerations override procedural ones, as in protecting the relationship of physicians and their patients. MISS. CODE ANN. § 1697 (1956). However, the distinction, in regard to rules of evidence, is finely drawn. Wigmore has recognized that the legislative branch may play a significant role in establishing evidentiary rules, although it cannot validly "exercise a judicial power" in doing so. Since that power involves the ascertainment of facts to which appropriate principles of law are then applied, any legislative enactment "which prevents the judicial body from ascertaining the facts in litigation . . . is ineffective." 1 WIGMORE ON EVIDENCE, § 7 (3d ed. 1965). Dean Wigmore has also recognized that, "The judicial function constitutionally empowers *the Courts to make their own rules of procedure,* including rules of Evidence." *Id.* (1970 *Supp.*) It has been argued that judges are better equipped than legislators

review and appeal procedures[131] are examples of judicial function to be governed by the courts themselves.

The foregoing review is not intended to be exhaustive, but it merely shows the breadth of the rule-making power, while at the same time suggesting some of the guideposts which should differentiate that power from the legitimate legislative policy making role.

IV. Judicial Rule-Making in Mississippi: A Practical Proposal

The foregoing discussion has demonstrated that the Mississippi Supreme Court has ample inherent power, stemming from the constitutional grant of the judicial power and the prohibition against usurpation by one governmental branch of the functions properly the domain of the other branches, to promulgate court rules. It has also suggested the extent to which that rule-making power might effectively be utilized.

But an important consideration remains; there are numerous statutes which now govern most, if not all, of the subjects which seem appropriate for judicial control. Assuming the court's willingness to exercise its historic function in the rule-making field, is not the existence of these statutes an insurmountable obstacle? Will it be necessary for the court to declare them all unconstitutional as infringements upon its constitutional prerogatives — an admittedly difficult decision in the face of a long history of acquiesence in the statutory scheme? This section of this paper posits an approach which is designed to avoid those agonizing decisions and at the same time to permit the court to recapture the role which is so obviously and rightfully its own. The desperate need for reform of judicial procedure pleads eloquently for its acceptance.

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to judge the value of evidentiary rules and, for this reason, "evidence is a proper subject for rules of court." Green, *To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence?*, 26 A.B.A.J. 482, 489 (1940). In *Appeal of Dattilo*, 136 Conn. 488, 72 A.2d 50 (1950), it was held that, without legislative authority, the courts have inherent power to establish rules of evidence. *Accord*, Perin v. Peuler, 373 Mich. 531, 130 N.W.2d 4 (1964); Northern States Power Company v. Esperson, 274 Minn. 451, 144 N.W.2d 372 (1966), relying on *Wigmore, supra*. Contra, State v. Pavelich, 153 Wash. 379, 279 P. 1102 (1929), holding that "Rules of evidence constitute substantive law, and cannot be governed by rules of court." 279 P. at 1103. This latter view does not obtain in Mississippi. Gulf M. & N. R.R. v. Weldy, 193 Miss. 59, 8 So. 2d 249 (1942).

[130]Joiner & Miller, *supra* note 103, at 651. But whether a judgment should constitute a lien, and if so on what property, would seem to require legislative policy decisions.

[131]*Id.* at 651-52.

It should be recalled that the legislature has no constitutional *power* to "disturb" constitutional courts in the exercise of "their functions and their orderly processes."[132] Where legislative control of judicial procedure has existed, many courts have seen it in terms of coöperation between coordinate branches of government without according any dominance to the legislative pronouncement.[133]

Seen in that light, it can readily be understood that legislative procedural pronouncements may and should be followed by the courts *so long as they provide an adequate system of judicial administration.* When such statutes fail to fulfill that requirement, however, then the court, in the exercise of its constitutional responsibilities, is obligated to depart from the statutory scheme and to devise its own procedures to effectuate the judicial function. This was the solution adopted in *Craft v. Commonwealth,*[134] wherein the Kentucky Supreme Court asserted its inherent rule-making power against a statute. A similar approach was taken in *State ex rel. Purcell* v. *Superior Court.*[135] There a statute provided a means for the release of persons charged with misdemeanors without the necessity of appearance before a magistrate. The Supreme Court of Arizona held: "Until we conclude that the legislative procedures are inadequate or other procedures will best effectuate the new right, the legislative action will be deemed the rules of this Court."[136]

The approach taken in these cases seems to rest upon firm foundation. The inherent power to make rules of practice and procedure exists "independent of and despite any statute;"[137] therefore, while deference may be given statutes so long as they do not impair the administration of justice, the inherent judicial power "carries with it a comparable supremacy of judicial rule over statute"[138] if the rule fairly falls within the scope of that inherent power.

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[132]*Ex parte* Huguley Water System, 213 So. 2d 799 (Ala. 1968).

[133]Burton v. Mayer, 274 Ky. 263, 118 S.W.2d 547 (1938); Craft v. Commonwealth, 343 S.W.2d 150 (Ky. 1961); State *ex rel* Foster-Wyman Lumber Co. v. Superior Court, 148 Wash. 1, 267 P. 770 (1928); R. E. W. Construction Company v. District Court of Third Jud. Dist., 400 P.2d 390 (Idaho 1965).

[134]343 S.W.2d 150 (Ky. 1961).

[135]107 Ariz. 224, 485 P.2d 549 (1971).

[136]485 P.2d at 552. Dean Pound once suggested that the first rule likely to be adopted by the court exercising the rule-making power would be "that the existing practice should obtain until superseded or altered." Pound, *Regulation of Judicial Procedure by Rules of Court,* 10 ILL. L. REV. 163, 176 (1915). Such a rule has long been in force in Michigan. *See* Perin v. Peuler, 373 Mich. 531, 130 N.W.2d 4 (1964).

[137]State Bar Association v. Connecticut Bank & Trust Co., 145 Conn. 222, 232, 140 A.2d 863, 869 (1958).

[138]*The Judiciary and the Rule-Making Power, supra* note 51.

It is not necessary that our present procedural statutes be repealed or declared invalid by the court. All that is necessary is that the court assert its inherent power to prescribe rules of pleading, practice, and procedure and prepare and promulgate such rules, following such statutes where they may still be useful but departing from them when "the administration of justice is impaired"[139] by the statutory procedure. It is clear that procedural rules, adopted in the exercise of the court's inherent power, have the force of law;[140] when a valid court-enunciated rule, adopted in the exercise of that constitutional power, conflicts with a contrary statute, the statute may be ignored and the rule enforced.[141]

Conclusion

The proposals herein advanced are admittedly novel to this state. It is submitted, however, that they rest upon a more solid foundation than does our present statutory procedural scheme, which has little to support it but years of judicial silence. The need is pressing, for there is every indication that public confidence in the judicial system is at low ebb. There is really no reason why the court should await the pleasure of the legislative branch to secure the many reforms that are required to equip the courts to handle their business in a business-like manner. This will take some courage and judicial statesmanship, but one likes to think that the proud heritage of the Mississippi bench and bar is capable of providing no less than that. As was said in *Petition of Florida State Bar Association*:[142]

> The administration of justice is the primary function of the judiciary. Practice and procedure is the vehicle by which justice is orderly administered. . . .Courts have the facilities, the technical knowledge, and experience which much better equip them for this duty than the Legislature. In such a situation, they should refrain from grounds of self abnegation and embrace the opportunity to prescribe procedure that will make the administration of justice everything that the man of the street has been taught to expect. . . .[143]

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[139]Craft v. Commonwealth, 343 S.W.2d 150 (Ky. 1961).

[140]State v. Atterberry, 129 S.C. 464, 124 S.E. 648 (1924); Rosenfield v. Kay Jewelry Stores, Inc., 400 F.2d 89 (10th Cir. 1968); Mosing v. Hagen, 148 N.W.2d 93 (Wis. 1967). Further, in Alabama (equity rules), Delaware, Florida, Hawaii, Iowa, Michigan, Rhode Island, and Vermont, and possibly in South Dakota and Wisconsin, constitutional or statutory provisions explicitly provide that rules promulgated by the court supersede statutes in conflict with such rules. *See* Report No. 13, The American Judicature Society, *The Judicial Rule-Making in State Court Systems* (1970).

[141]Buscaino v. Rhodes, 385 Mich. 474, 189 N.W.2d 202 (1971).

[142]155 Fla. 710, 21 So. 2d 605 (1945).

[143]*Id.*, 21 So. 2d at 608.

Nearly fifty years ago Dean Pound argued that a court-established procedural rule practice is simpler, more responsive to needed changes, and more flexible.[144] Experience with judicial rule-making had no drawbacks, he said, "beyond those familiar vague and general prophecies of disaster with which in all cases our best lawyers have always greeted any project with which they were unfamiliar."[145]

Dean Pound's appraisal does not stand alone. Another commentator has stated:

> It is a sad but accurate commentary that the legal profession has generally been the force most opposed to improvement of judicial procedure. Where reform has come, its advent has generally been the result of public insistence, often over active resistance from the legal profession.[146]

We should be able to stand taller than that.

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[144]Pound, *supra* note 16.

[145]*Id.* at 603.

[146]Sunderland, *The English Struggle For Procedural Reform,* 39 HARV. L. REV. 725 (1926).

STUDENT COMMENTS

CHECK FORGERIES: RIGHTS, DUTIES AND LIABILITIES OF PAYOR AND COLLECTING BANKS UNDER THE UNIFORM COMMERCIAL CODE

I. Introduction

Checks have become indispensable in the affairs of everyday life. The universal usage of checks has been prompted by their inherent convenience in discharging monetary obligations of individuals and corporations. Abusive practices, however, have accompanied the check phenomenon, creating perplexing legal problems. These practices relate to fraudulent checks which pervade the commercial sector of our society.[1] Fraudulent checks precipitate losses in the range of $600,000,000 annually.[2] Banking institutions absorb approximately $6,000,000 of this loss.[3]

Some forms of check frauds confront banks with a dilemma. With respect to forged indorsements, a bank has no assurance that the indorsement of the payee is authentic when the check is presented by a special indorsee. In most instances the bank is unfamiliar with the payee designated on the instrument.[4]

Computers are utilized today to facilitate the prompt remittance of the immense volume of checks which a bank handles. As a result banks have begun to place less emphasis on comparing the purported signature of the drawer with the customer's signature card in determining

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[1]Fraudulent checks encompass a broad spectrum which include no-account checks, overdrafts, altered checks, unauthorized checks, checks bearing unauthorized and improper indorsements, checks payable to nominal payees, checks containing the drawer's forged signature, and checks bearing the unauthorized signature of both the drawer and payee or indorsee.

[2]Franklin Nat'l Bank v. Shapiro, 7 UCC Rep. Serv. 317, 322 (N.Y. Sup. Ct. Nassau County February 9, 1970); O'Malley, *Common Check Frauds And The Uniform Commercial Code,* 23 Rutgers L. Rev. 189 (1969) [hereinafter cited as O'Malley, *Common Check Frauds*].

[3]*Id.*

[4]*See, e.g.,* Oxford Prod. Credit Ass'n v. Bank of Oxford, 196 Miss. 50, 16 So. 2d 384 (1944).

[5]*See generally* J. Clark, H. Bailey and R. Young, Bank Deposits and Collections 174 (3d ed. 1963) [hereinafter cited as Clark, Bailey and Young]; Penney, *Bank Statements, Cancelled Checks, and Article Four in the Electronic Age,* 65 Mich. L. Rev. 1341 (1967); O'Malley, *Common Check Frauds, supra* note 2, at 209 nn. 110-112.

whether to charge the check to the drawer's account. Computers have led banks to rely on the magnetic encoded numbers contained on the check in debiting items to the drawer's account. Even in cases in which a signature comparison is made, it is conducted in a perfunctory manner. These lax procedures have facilitated forgeries of drawers' signatures.[6]

On March 31, 1968, the Uniform Commercial Code (UCC) became effective in Mississippi.[7] Among the multifarious commercial transactions encompassed by the Code are those relating to commercial paper and bank deposits and collections. Rules which apply to various types of check frauds are found within these provisions, and banking concerns have an avid interest in these statutes since they will affect their liability.

With the increase in the volume of checks each year there will be a corresponding increase in both the number and amount of fraudulent checks.[8] It is perhaps fortunate that the Code has been promulgated to prescribe rules pertinent to this area. Underlying the formulation of the UCC is the intensive research by various bodies which have focused on the precise nature of the problem—how the loss should be allocated among the parties to the transaction.[9] It is also desirable to have laws that are intended to be uniform among the states; this is a declared purpose of the Code.[10] To date, the UCC has been adopted in forty-nine of the fifty states, the District of Columbia, and in the Virgin Islands.[11]

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[6]Johnson, *Automation, Forged Checks and The N. I. L.*, 14 BUSINESS LAWYER 1008, 1008-1009 (1959); O'Malley, *Common Check Frauds, supra* note 2, at 209; Penney, *supra* note 5, at 1341.

[7]MISS. CODE ANN. §§ 41A:1-101 *et seq.* (Supp. 1968) [the Mississippi Uniform Code will be hereinafter cited as UCC without the prefix "41A:" appearing before the applicable section number as contained in MISS. CODE ANN.].

[8]In 1962, the estimated volume of checks approached 14.5 billion which amounted to 4.7 trillion dollars. O'Malley, *Common Check Frauds, supra* note 2, at 190 n. 9. This was forecasted to have reached a volume of twenty-two billion checks by 1970. Farnsworth, *A General Survey of Article 3 and an Example of Two Aspects of Codification,* 44 TEXAS L. REV. 645, 652 n. 63 (1966). It has been stated that checks are used in ninety-five per cent of all business transactions. Vergari, *In re Articles 3, 4 and 5,* 28 TEMP. L.Q. 529, 538 (1955).

[9]Franklin Nat'l Bank v. Shapiro, 7 UCC REP. SERV. 317, 322 (N.Y. Sup. Ct. Nassau County February 9, 1970).

[10]UNIFORM COMMERCIAL CODE § 1-102(c) [hereinafter cited as UCC].

[11]United States v. Bank of America, 288 F. Supp. 343, 345 n. 2 (N.D. Cal. 1968), *aff'd,* 438 F.2d 1213 (9th Cir. 1971). *See also* H. BAILEY, BRADY ON BANK CHECKS § 1.4, at 3-4 (4th ed. Supp. 1972) [hereinafter cited as BAILEY, BRADY ON BANK CHECKS].

The Code is not a panacea. There are many situations in which this commercial statutory maze declares no rule of law. There are other instances in which the UCC is vague, unclear, and ambiguous. Thus, the Code does not contain an exclusive enumeration applicable to all transactions. In circumstances in which the Code is silent, the general principles of law and equity are to govern.[12] This must be considered in conjunction with § 1-102 (1) which provides that the UCC is to be liberally construed to promote its underlying policies.

It is the purpose of this article to explore the rights, duties, and liabilities of collecting and payor banks, as they exist under the UCC, in relation to four varieties of fraudulent checks: (1) checks bearing forged or unauthorized indorsements; (2) checks payable to nominal payees; (3) checks containing the forged signature of the drawer; and (4) checks containing both the forged signature of the payee or indorsee and drawer. This article will entail an examination of the relevant provisions of the UCC; ascertainment of the extent which prior law has been displaced by the Code; determination of the degree to which prior law shall continue to contribute a viable role in the resolution of check forgery cases; an analysis of cases from other jurisdictions for explanation and guidance;[13] and speculations on various undecided issues presented by the UCC.[14]

II. Mississippi Pre-Code Law

A. Forged Indorsements

Since prior law may continue to play an integral role under the Code, it is appropriate to examine the law in Mississippi as it existed

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[12]UCC § 1-103.

[13]While cases from other jurisdictions are not authoritative, they may be used to aid in construing and applying the UCC to attain one of its salutary goals—uniformity of laws among the various jurisdictions. Evans v. Everett, 10 N.C. App. 435, 179 S.E.2d 120 (1971). A similar recognition was made by the Mississippi Supreme Court in a case arising under the provisions of the Uniform Negotiable Instruments Law. First Nat'l Bank v. Deposit Guar. Bank & Trust Co., 247 Miss. 765, 156 So. 2d 814 (1963).

[14]An understanding of several terms used throughout this article is necessary. Drawers are individuals who sign checks as the maker. Payees are those to whom checks are drawn payable. Collecting banks are banks which handle checks for collection and are not, also, payor banks. UCC § 4-105 (d). A collecting bank may, however, also be a depositary bank, the first bank to which an item is transferred for collection. UCC § 4-105 (a). A payor bank is the bank upon whom the check is drawn. UCC § 4-105 (b). The terms "payor bank" and "drawee bank" are used interchangeably throughout this discussion; the term "payor bank" is the UCC and the more modern version of the term "drawee bank."

before the adoption of the UCC. A starting point for such an inquiry may begin with a case decided in 1911.[15] A drawer was allowed to recover from the drawee bank for payment of a check bearing the forged indorsement of the payee. The statute of limitations was deemed to have commenced when the drawer's demand to recredit his account was refused by the drawee bank.

One year later, in a somewhat novel fact situation, the court permitted direct recovery by a payee from the collecting bank for cashing a check containing the payee's forged indorsement.[16] A check was mailed by the drawer to the payee's Gulfport address in care of general delivery. There was another person residing in Gulfport having a name and address identical to that of the payee. When procuring his mail, the individual was given the check addressed to the payee. After indorsing the instrument, he cashed the check at the collecting bank where he was known and maintained an account. A form of absolute liability was placed on the bank for cashing the check over the forged indorsement.

> Banks taking checks must know the true parties claiming to own them—in fact, who do own them—and they act at their peril. Where there are two or more persons of the same name, it cannot be anticipated that one of them will commit a crime and forge the name of the other to an instrument which may have accidently come into his hands.[17]

In 1916 the Uniform Negotiable Instruments Law (NIL) became effective in Mississippi. One of the first forged indorsement cases construing the Act occurred in *Federal Land Bank v. Collins*.[18] A check was cashed by the collecting bank which bore the unauthorized indorsement of one of the co-payees. Subsequently the check was sent to the drawee bank who charged the check to its customer's account and remitted the proceeds to the collecting bank. The defrauded co-payee sought to hold both the collecting and drawee banks liable on the theory of an implied contract. Finding no privity of contract between the co-payee and the collecting and drawee banks, the court found the action impermissible. According to the NIL, as interpreted by the court, a bank does not become liable until it has accepted or certified the check.[19] Payment of a check, even over a forged indorsement, was not equivalent to an acceptance or certification. Since the

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[15]Masonic Benefit Ass'n v. First State Bank, 99 Miss. 610, 55 So. 408 (1911).

[16]Thomas v. First Nat'l Bank, 101 Miss. 500, 58 So. 478 (1912).

[17]*Id.* at 515, 58 So. at 480.

[18]156 Miss. 893, 127 So. 570 (1930).

[19]UNIFORM NEGOTIABLE INSTRUMENTS LAW §§ 132, 189 [hereinafter cited as NIL].

banks had neither accepted nor certified the check there were no contractual obligations to the payee.[20] It was not until the waning moments of the existence of the NIL that Mississippi aligned itself with jurisdictions allowing a payee to sue both the drawee and collecting banks in tort for conversion.[21]

Beginning with the early English case of *Young v. Grote*,[22] a rule emerged that the placement of an unauthorized signature caused by one's negligence will preclude the assertion of a bank's improper payment resulting therefrom. In *Hart v. Moore*[23] the drawee bank contended that the payee was estopped due to his negligence to recover the proceeds of a check cashed over his forged indorsement. The purported negligence consisted of directing the drawer to deliver the check to the payee's agent who was known to be untrustworthy and unreliable.[24] Recognizing that the rationale of *Young v. Grote* had been rejected in Mississippi jurisprudence,[25] the drawee bank was held liable for the improper payment.

In *Oxford Production Credit Association v. Bank of Oxford* the drawer's surety, having received an assignment of the drawer's rights against the drawee bank, after making good the drawer's loss, sought recovery on checks paid by the drawee containing forged indorsements. The court held that the drawee bank had not been negligent in paying the checks. Focusing on the plight of drawee banks in forged indorsement cases, the court stated that the drawee had no means to ascertain the authenticity of the payee's signatures since they were obscure persons residing in various counties. It would be impossible for a drawee bank, before payment of the checks, to locate the indorsers and determine the veritableness of their signatures. Basing the decision on the compensated surety doctrine, the court found that the drawee bank was

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[20]It should be observed that NIL §§ 132 and 189 refer to a drawee bank. A careful reading of the decision indicates that the court treated these provisions as applying equally to both the collecting and drawee banks. Although the decision is accurate as it pertains to the drawee bank, the court made an erroneous application by using the same theory in exonerating the collecting bank.

[21]Kaplan v. Deposit Guar. Nat'l Bank & Trust Co., 192 So. 2d 391 (Miss. 1966).

[22]4 Bing. 253, 10 Eng. Rep. 764 (1827).

[23]171 Miss. 838, 158 So. 490 (1935).

[24]It was alleged that the agent had been an inmate at the state penitentiary due to a conviction for embezzlement. In addition, it was charged that the agent could not be trusted because, aside from the embezzlement conviction, he had been disbarred from the practice of law for committing perjury, and was addicted to drinking intoxicants. *Id.* at 846, 158 So. at 492.

[25]Simmons v. Atkinson & Lampton Co., 69 Miss. 862, 12 So. 263 (1892).

crowned with the superior equity. Here the surety had been paid to indemnify the drawer and the drawee bank was not negligent.[26]

Because collecting and drawee banks are liable for handling checks with forged indorsements, the emphasis now shifts to the party bearing the immediate loss. In an early Mississippi case, prior to the adoption of the NIL, it was held that each indorser warrants to his transferee the genuineness of prior indorsements as well as his good title to the instruments.[27] A drawee bank may recover from a prior party on the basis of this warranty.

Under the NIL there was a conflict of authority as to whether a collecting bank or other party, receiving payment from the drawee bank, extended a warranty as to the genuineness of the indorsements.[28] Although the NIL contained warranties arising from the negotiation of a check,[29] there were no provisions expressly providing for a warranty when a check was paid by a drawee bank. Technically a check presented to a drawee bank for payment is not a negotiation; the check is merely surrendered or presented for payment. It was stated that the drawee's right to recover its loss resulting from payment of a check over a forged indorsement was based on mistake in fact and, therefore, was quasi-contractual in nature. Thus, no warranties were given under the NIL by a collecting bank, or other party presenting a check for payment to the drawee, that all indorsements were genuine.[30]

Mississippi never addressed itself to the problem as to whether a drawee may recover from the collecting bank under the NIL on the

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[26]196 Miss. 50, 16 So. 2d 384 (1944).

Generally the compensated surety doctrine precludes a surety from recovering against an innocent third party, although technically liable, when the surety has expressly assented to make good the loss, and has no superior equities against the party from whom subrogation is sought.

In the instant case the surety apparently seized on the assignment theory in order to circumvent the compensated surety defense which was recognized in National Sur. Co. v. Edwards House Co., 191 Miss. 884, 4 So. 2d 340 (1941). Some jurisdictions had recognized an assignment to be immune from the compensated surety doctrine since an assignment was an action at law. Here, the court refused to draw a distinction between an assignment and subrogation as a means to avoid the compensated surety defense. *See* O'Malley, *Subrogation Against Banks on Forged Checks,* 51 CORNELL L.Q. 441 (1966) for an excellent discussion of the compensated surety doctrine.

[27]Williams v. Tishomingo Sav. Institution, 57 Miss. 633 (1880).

[28]W. BRITTON, HANDBOOK ON THE LAW OF BILLS AND NOTES § 139 (2d ed. 1961) [hereinafter cited as BRITTON, BILLS AND NOTES].

[29]NIL §§ 65, 66.

[30]*See* State Planters Bank & Trust Co. v. Fifth-Third Union Trust Co., 56 Ohio App. 309, 10 N.E.2d 935 (1937).

basis of a warranty of genuineness of the indorsements. In one case it was held that a drawee bank may recover from one who presents for payment a check which contains the payee's forged indorsement.[31] It was said that an indorser guarantees the genuineness of all prior indorsements. No differentiation was made between "payment" and "negotiation" of a check presented to the drawee for payment; the court erroneously treated a presentment for payment as synonymous with a negotiation.

The law, as it emerged in Mississippi, permitted a drawee to obtain restitution from the collecting bank on checks paid over forged indorsements. It was stated that

> [W]hile a bank is required at its peril to know the signature of its depositor, it is not required to know the signature of the payee named in a check of its depositor, who is unknown to the bank with whose signature it is not familiar; and that the . . . endorser, whether for accomodation or for value, guarantees the genuineness of previous endorsements upon a check which he negotiates.[32]

In *First National Bank v. Deposit Guaranty Bank & Trust Co.*[33] the signature of both the drawer and payee were forged on several checks. Restitution was denied to the drawee from the collecting bank. It was observed that "[t]he warranty of an endorsement . . . does not apply to payment of a check by a drawee bank."[34]

> [T]he [collecting bank] owed the . . . drawee-bank no duty, imposed by custom or otherwise, to inquire into the genuineness of the check. It has the right to take the risk of advancing money upon it, if it were forged, or if for any other reason the [drawee] was justified in refusing to pay it. The [drawee's] counter is the proper place at which to ascertain whether or not the check was genuine.[35] . . . The cashing of a check by the bank upon which it is drawn effectually closes the transaction.[36]

It should be noted that the court was referring to a warranty which might arise when a check bears the drawer's forged signature.

Mutations in the law of forged indorsements arose in *Holmes County Bank & Trust Co. v. Grenada Trust & Banking Co.*[37] An at-

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[31]Citizens Bank v. Miller, 194 Miss. 557, 11 So. 2d 457 (1943).
[32]*Id.* at 567, 11 So. 2d at 460.
[33]247 Miss. 765, 156 So. 2d 814 (1963).
[34]*Id.* at 775, 156 So. 2d at 818.
[35]*Id.* at 777, 156 So. 2d at 818.
[36]*Id.* at 777, 156 So. 2d at 819.
[37]231 So. 2d 505 (Miss. 1970).

torney received checks payable to certain of his clients. After typing the names of the payees on the back of the checks and indorsing his own name thereto, the attorney deposited the checks into his account at the collecting bank. Subsequently the attorney withdrew the funds from his account. In an action between the drawee and collecting bank, the Mississippi Supreme Court held that the loss must be placed on the drawee bank. Reliance for the decision was based on *First National Bank v. Deposit Guaranty Bank & Trust Co.,* the court stating those "facts . . . [were] strikingly similar to the case at bar and the rule of law in [*First National Bank*] governs and controls here."[38]

Holmes County Bank & Trust Co. was at variance with prior law as established by the Mississippi Supreme Court and created concern among banking institutions. One commentator submitted that the decision was erroneously based on rules relating to forged-signature checks rather than forged indorsements.[39] The recent decision of *Mississippi Bank & Trust Co. v. County Supplies & Diesel Service, Inc.,*[40] decided under the UCC, clarified the law. *Holmes County Bank & Trust Co.* was overruled and the traditional rule of liability restored. A statement enunciated in *First National Bank*[41] that the warranties of indorsements do not apply to payments by drawee banks was also overruled.[42] This was considered to have precipitated the wrong decision in *Holmes County Bank & Trust Co.*[43]

B. Forged-Signature Checks

Contrary to the rule relating to forged indorsements, a drawee bank is presumed to know the signature of its depositors. This principle has its rudimentary concepts from the renowned case of *Price v. Neal.*[44] Two bills of exchange, designating Price as the drawee, contained the forged signature of the maker. Neal received the bills without knowledge of the forgery. Payment was received from Price on

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[38]247 Miss. 765, 156 So. 2d 814 (1963).

[39]BAILEY, BRADY ON BANK CHECKS, *supra* note 11, § 15.11, at 147.

[40]253 So. 2d 828 (Miss. 1971).

[41]247 Miss. 765, 775, 156 So. 2d 814, 818 (1963).

[42]253 So. 2d at 833 (Miss. 1971).

[43]*Id.* Presiding Justice Rodgers issued a concurring opinion in which he stated that the phrase was taken out of context when applied in *Holmes County Bank & Trust Co.* It was his belief that the statement was still good law as applied to the facts of *First National Bank v. Deposit Guaranty Bank & Trust Co. Id.* at 833. Justice Brady separately concurred admitting that *Holmes County Bank & Trust Co.* was erroneously decided. *Id.* at 833-34.

[44]3 Burr. 1354, 97 Eng. Rep. 871 (K.B. 1762).

both bills, one having been accepted before payment and the other being paid without a prior acceptance. Upon discovering that the signature of the drawer was forged, Price sued Neal to collect the money paid under mistake of fact. Lord Mansfield, denying recovery, held that the drawee must ascertain the genuineness of drawers' signatures before acceptance or payment. Looming from *Price v. Neal* is the rule that a drawee may not obtain restitution for its mistaken payment when it has access to information which would indicate that the instrument should not be paid.[45]

It should be observed that the general rule relating to payment under a mistake of fact is governed by the rule of unjust enrichment. One who has received money when he was not, in fact, legally entitled to it has been unjustly enriched and normally an action in quasi-contract can be maintained to recover the mistaken payment.[46] However, *Price v. Neal* constitutes an exception to the general proposition that the payor may recover on restitutionary principles.[47]

Price v. Neal was incorporated into Mississippi jurisprudence in *Railway Express Agency v. Bank of Philadelphia*.[48] It was held to be negligence for a bank to pay a check of its depositor without first knowing the authenticity of the signature. A drawee bank will, therefore, not be permitted to recover from one obtaining payment in good faith and without knowledge of the forgery.

Although a depositor can demand that the drawee bank recredit his account for paying a check over the drawer's unauthorized signature, this general rule is subject to qualification. A rule developed that a drawer has a duty to examine his monthly bank statements and cancelled checks and report forgeries of his signature. Upon the depositor's failure to make an examination he is estopped to contest the drawee's payment of subsequent checks by the same forger.[49]

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[45]*See* UCC § 3-417, Comment 3; § 3-418, Comment 1; Farnsworth, *Insurance Against Check Forgery*, 60 COLUM. L. REV. 284, 302-03 (1960). For the reader desiring to further explore the rationale of *Price v. Neal* and its application, the following articles are recommended: Aigler, *The Doctrine of Price v. Neal*, 24 MICH. L. REV. 809 (1926); Ames, *The Doctrine of Price v. Neal*, 4 HARV. L. REV. 297 (1891); Cooper, *Forgery, Price v. Neal*, 8 ORE. L. REV. 872 (1929); O'Malley, *Common Check Frauds*, *supra* note 1.

[46]W. KEENER, QUASI CONTRACTS 27 (1893).

[47]*See* RESTATEMENT OF RESTITUTION § 33 (1937); F. WOODWARD, THE LAW OF QUASI CONTRACTS § 80, at 127 (1913).

[48]168 Miss. 279, 150 So. 525 (1933).

[49]*See* Deer Island Fish & Oyster Co. v. First Nat'l Bank, 166 Miss. 162, 146 So. 116 (1933); National Sur. Corp. v. City Bank & Trust Co., 248 Wis. 32, 20 N.W.2d 559 (1945).

Evolving in Mississippi was the rule that the drawee bank must, in the first instance, be free of negligence in paying the checks. Then the drawee may assert its customer's failure to examine his bank statement within a reasonable time. The issues of negligence of the bank in paying the item as well as a reasonable length of time for a depositor to discover forgeries were questions of fact depending on the circumstances of each case.[50]

In one case which applied this rule, the depositor's bookkeeper forged checks over a six month period before his infidelity was detected.[51] A jury found the bank negligent in paying the checks; the bank was, therefore, not allowed to claim that the depositor was derelict in examining his bank statements and cancelled checks.

A subsequent case, containing a somewhat flagrant factual situation, followed this rationale.[52] Not authorized to sign checks, a secretary diverted funds of her employer by signing checks in her own name on her employer's checking account. She also cashed checks payable to her employer after forging his indorsement. Her perfidy persisted for over five years before it was discovered. The bank was found negligent in paying the items on the unauthorized signature as well as accepting checks payable to the principal which the secretary had deposited into her personal account. This negligence obviated any inquiry into the employer's inadvertence in examining the statements and reporting the forgeries.

III. Forged Indorsements Under the UCC

A. Liability of Payor Banks

1. Actions by Payees

Under the UCC, a payor bank finally paying a check bearing the forged indorsement of the payee will incur liability as a general proposition.[53] A suitable benchmark for comparative purposes to begin an initial inquiry into the nature and scope of the payor's rights and

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[50]Commercial Nat'l Bank & Trust Co. v. Hughes, 243 Miss. 252, 137 So. 2d 800 (1962); Deer Island Fish & Oyster Co. v. First Nat'l Bank, 166 Miss. 162, 146 So. 116 (1933).

[51]Deer Island Fish & Oyster Co. v. First Nat'l Bank, 166 Miss. 162, 146 So. 116 (1933).

[52]Commercial Nat'l Bank & Trust Co. v. Hughes, 243 Miss. 252, 137 So. 2d 800 (1962).

[53]*See* State Nat'l Bank v. Sumco Eng'r, Inc., 46 Ala. App. 244, 240 So. 2d 366, *cert. denied,* 286 Ala. 740, 240 So. 2d 369 (1970). *See generally* Annot., 23 A.L.R.3d 936 (1969); 18 A.L.R.3d 1393 (1968).

liabilities toward the payee is presented in the recent case of *Mississippi Bank & Trust Co. v. County Supplies & Diesel Service, Inc.*[54]

A warrant was drawn[55] payable to the order of the plaintiff on the drawer's account at the payor bank. The warrant was delivered to the plaintiff's agent, a commission salesman. Subsequently the agent opened a personal checking account in his own name at the collecting bank. Making no inquiry concerning the agent's authority to indorse the warrant on behalf of the payee, the collecting bank permitted the salesman to deposit the check into his personal account. Crediting the agent's account for the amount of the item, the collecting bank received final payment from the payor bank who, in turn, debited the drawer's account. Seeking to recover the amount of the check, the payee instituted an action against both the payor and collecting banks. As to the payor's liability, the court stated that "a payee may recover from the drawee bank directly on a forged or unauthorized indorsement of its name as payee."[56] It is interesting to note that the court cited no provision of the UCC for its holdings that the payor bank was directly liable to the payee. Provenance for the court's pronouncement was based exclusively on cases decided prior to the adoption of the Code.[57]

An explicit provision is contained in the UCC relating to checks paid on a forged indorsement.[58] Payment in such cases is denominated as conversion.[59] Absolute liability, subject to certain qualifications,[60]

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[54]253 So. 2d 828 (Miss. 1971).

[55]The court stated that the warrant was *issued*. 253 So. 2d at 828 (Miss. 1971). Apparently the court meant that the warrant was "drawn" rather than "issued." According to UCC § 3-102 (1) (a), "issue" is defined as the first delivery of the check to a holder. Holder is defined in UCC § 1-201 (20) as "a person who is in possession of . . . an instrument . . . drawn, issued, or indorsed to him or to his order or in blank." Consequently, the warrant could not have been issued since there was a delivery to one who was not a holder within the strictures of the Code. If the check was, in fact, issued the results of the decision would have been different since the agent would be a holder and his subsequent indorsement would have been valid to pass title. An issuance, technically speaking, would allow a check to be negotiated. However, a check bearing a forged indorsement can never be negotiated when it is not in the possession of a holder. *See infra* notes 66-68.

[56]253 So. 2d at 830 (Miss. 1971).

[57]Commercial Nat'l Bank & Trust Co. v. Hughes, 243 Miss. 252, 137 So. 2d 800 (1962); Hart v. Moore, 171 Miss. 838, 158 So. 490 (1935); Masonic Benefit Ass'n v. First State Bank, 99 Miss. 610, 55 So. 408 (1911).

[58]UCC § 3-419 (1) (c).

[59]UCC § 3-419 provides in part:

(1) An instrument is converted when (c) it is paid on a forged indorsement.

[60]UCC §§ 3-404, 3-405, 3-406.

is imposed upon the drawee bank for the face amount of the instrument to the true owner.[61]

It should be noted that § 3-419 (1) (c) states that a check is converted when it is paid over a forged indorsement. Unauthorized signatures are defined by the UCC as including forged endorsements.[62] Due to this inclusion of forged indorsements with unauthorized indorsements conversion may also occur when a check is paid bearing an unauthorized indorsement.[63] It must be kept in mind that an unauthorized indorsement is not necessarily a forgery. The unauthorized indorsement is merely treated as a forged indorsement for the purposes of conversion under the UCC.

Checks may be drawn payable to order[64] or bearer.[65] For a check to be negotiated, there must be a negotiation within the strictures of the UCC.[66] Whether a check has been negotiated within the meaning of the Code will depend in part on the terminology of the payee clause. If the check is payable to order, there must be both a delivery coupled with the necessary indorsement.[67] Bearer checks are negotiated by delivery alone and do not necessitate any indorsement.[68]

If the payee's indorsement has been forged on checks payable to order, there is absent the necessary indorsement for a proper negotiation. Consequently no subsequent transferee of a forger can ever become a holder and, therefore, can not attain the status of a holder in due course.[69] Likewise, a check payable to order which is transferred

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[61]UCC § 3-419 (2). *See* UCC § 3-419, Comment 4; Gast v. Am. Cas. Co., 99 N.J. Super. 538, 240 A.2d 682 (1968).

[62]UCC § 1-201 (43).

[63]*See, e.g.,* Salsman v. National Community Bank, 102 N.J. Super. 482, 246 A.2d 162, *aff'd,* 105 N.J. Super. 164, 251 A.2d 460 (1968); 2 R. ANDERSON, UNIFORM COMMERCIAL CODE § 3-419:4, at 1034-35 (2d ed. 1971) in which it is stated that the courts have engrafted another form of conversion into § 3-419 (1) (c) from judicial construction—payment of checks over unauthorized indorsements.

[64]UCC § 3-110.

[65]UCC § 3-111.

[66]UCC § 3-202.

[67]UCC § 3-202 (1).

[68]*Id.*

[69]For one to be a holder in due course, he must first be a holder. UCC § 3-302 (1). A negotiation is the transfer of an instrument in such a manner that the transferee becomes a holder. UCC § 3-202 (1). When a check contains an unauthorized indorsement there can be no negotiation. Therefore, the transferee cannot become a holder when a prior indorsement contains a forged indorsement.

without an indorsement is not a negotiation.[70] Therefore, the transferee cannot become a holder in due course taking the check free of all claims by any person,[71] because he is not a holder.[72] When the check is payable to bearer, the contrary results occur. Since no indorsement is mandatory, the delivery of the instrument effectively completes the negotiation. Therefore the transferee is a holder, and if the other requirements are present he may be a holder in due course.[73]

Many checks are drawn payable to two or more payees. If a drawee pays a check which does not contain the indorsement of all the payees, the non-indorsing payee may recover against the payor bank in conversion.[74] Payor banks have been held liable to the non-indorsing payee for the face amount of the instrument notwithstanding the co-payee's interest in the proceeds was less than the amount of the check.[75]

An exception exists when the proceeds of the check actually reach the intended payee. In such cases a payor bank will not be held liable

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[70]UCC § 3-202 (1); Barden & Robeson Corp. v. Tompkins County Trust Co., 67 Misc. 2d 587, 324 N.Y.S.2d 543 (1971).

[71]UCC § 3-305 (1).

[72]Federal Deposit Ins. Corp. v. Marine Nat'l Bank, 431 F.2d 341 (5th Cir. 1970).

[73]*See, e.g.,* Insurance Co. of N. America v. Atlas Supply Co., 221 Ga. App. 1, 172 S.E.2d 632 (1970).

[74]Federal Deposit Ins. Corp. v. Marine Nat'l Bank, 431 F.2d 341 (5th Cir. 1970); State Nat'l Bank v. Sumco Eng'r, Inc., 46 Ala. App. 244, 240 So. 2d 366, *cert. denied,* 286 Ala. 740, 240 So. 2d 369 (1970); Borden & Robeson Corp. v. Tompkins County Trust Co., 67 Misc. 2d 543, 324 N.Y.S.2d 543 (1971); Continental Bank & Trust Co. v. American Trust Co., 217 Pa. Super. 371, 8 UCC Rep. Serv. 1092 (Pa. C.P. Montgomery County November 18, 1970). *See* Bailey, Brady on Bank Checks, *supra* note 11, § 15.14, at 149 n. 36.

[75]State Nat'l Bank v. Sumco Eng'r, Inc., 46 Ala. App. 244, 240 So. 2d 366, *cert. denied,* 286 Ala. 740, 240 So. 2d 369 (1970). Although this case was actually decided under pre-Code law, the court cited UCC §§ 3-419 (1) and (2) to support its conclusion that the payor bank was absolutely liable to the non-indorsing co-payee for the face amount of the check. As to the payor bank's contention that it was only liable for the amount of the payee's interest in the check, the court rebuffed by stating:

> The drawee did not pay the face amount of the check in accordance with the directions of the drawer. The unpaid payee is allowed to recover against the drawee for the face amount of the check absent any effort to prove a lesser interest in the face amount of said check. To hold otherwise would have the effect of thwarting the expressed intent of the drawer—as spelled out on the face of the check—communicated to the drawee bank, to pay to the order of the joint payees. The drawer had a right to expect the drawee to carry out his instructions to the letter, and the payees designated on the check had a right to expect that payment would be made to both of them in the absence of a direction to the contrary. 240 So. 2d at 368 (Ala. 1970).

in conversion even though the check has been paid over a forged indorsement.[76]

No period is designated in the UCC concerning the time within which a payee may sue the drawee bank. Such actions will be governed by the general statute of limitation. In an early Mississippi case it was held that the three year[77] statute of limitation applies.[78] However, since payment of a check over a forged indorsement constitutes conversion, it would appear that the statute of limitation relating to conversion would be applicable.[79] Mere ignorance or lack of discovery of the wrongful payment does not toll the statute, and a conversion occurs when a check is paid bearing a forged indorsement.[80]

2. Liability to Drawers

A payor bank's liability to its customer for payment of forged indorsement checks has its genesis in the traditional contractual relationship existing between these parties. When a drawer opens a checking account, the payor bank is charged with certain duties to its customer. An implied contract exists for the payor bank to only pay checks of its depositor according to the customer's orders as communicated to the drawee on the face of the check.

In the normal course of events, the depositor, simultaneously with the opening of a checking account, will sign a signature card which authorizes the bank to pay checks according to the customer's order. The signature card is retained by the drawee who uses it to compare the signatures appearing on the drawer's checks—his orders—to ascertain

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[76]Starkey Constr. Co. v. Elcon, Inc., 248 Ark. 958, 457 S.W.2d 509 (1970).

[77]MISS. CODE ANN. § 729 (1956) provides in part:

> Actions . . . on any unwritten contract, express or implied, shall be commenced within three years next after the cause of such action accrued, and not after.

[78]Federal Land Bank v. Collins, 156 Miss. 893, 127 So. 570 (1930).

[79]Gerber v. Manufacturers Hanover Trust Co., 64 Misc. 2d 687, 315 N.Y.S.2d 601 (1970). The court held that the action was governed by the statute of limitations applicable to conversion actions. This appears to be viable since payment over a forged indorsement is denoted as conversion. Therefore, it would seem that the Mississippi Courts could apply the six year statute of limitations applicable to tort actions in MISS. CODE ANN. § 722 (1956) which provides:

> All actions for which no other period of limitation is prescribed shall be commenced within six years next after the cause of action accrued, and not after.

[80]Gerber v. Manufacturers Hanover Trust Co., 64 Misc. 2d 687, 315 N.Y.S.2d 601 (1970).

their authenticity. It is a well-recognized rule that a drawee bank may only debit items[81] which are genuine to the account of its customer.[82]

Under the parlance of the Code a bank may charge any item against its customer's account which is "properly payable."[83] Since the commercial statutes do not define the phrase "properly payable," allusion to the law outside of the Code is necessary in order to discern its meaning.[84] It is an elementary rule of banking law that a check bearing the forged signature of the drawer, payee, or special endorsee is not "properly payable."[85] The Code fortifies this common law proposition by providing that an unauthorized signature is *wholly inoperative* as the signature of the person whose name was signed.[86] As stated by the Mississippi Supreme Court:

> [W]hen a person deposits money . . . in a bank . . . the relation of debtor and creditor is set up. . . .
> Title to the funds so deposited immediately vest in the bank, and whatever sum it pays upon a check of a creditor depositor is paid from the funds of the bank, and thereupon, if *properly paid,* the bank has the right to charge the depositor with the amount of such payment.[87] (Emphasis supplied)
> [I]t is quite well settled, and the general rule is, that a bank pays money upon a forged or unauthorized check at its own peril. . . .[88]

When a drawee pays a check bearing a forged signature of its depositor, payment by the drawee is not based upon the authentic orders of its customer.[89] Concomitantly, payment of a check over a forged indorsement is not proper since the drawer has directed the drawee to pay only to the payee designated on the check or in accord-

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[81]UCC § 4-104 (1) (g). Item is defined as any instrument used for the payment of money and includes non-negotiable instruments.

[82]*See, e.g.,* State Nat'l Bank v. Sumco Eng'r, Inc., 286 Ala. 740, 240 So. 2d 369 (1970); Jerman v. Bank of America, 7 Cal. App. 3d 882, 87 Cal. Rptr. 88 (1970); Masonic Benefit Ass'n v. First State Bank, 99 Miss. 160, 55 So. 408 (1911).

[83]UCC § 4-401 (1).

[84]UCC § 1-103.

[85]*See, e.g.,* Oxford Prod. Credit Ass'n v. Bank of Oxford, 196 Miss. 50, 16 So. 2d 384 (1944); *see also* O'Malley, *Common Check Frauds, supra* note 1, at 195 n. 36.

[86]UCC § 3-404 (1). *See* Pacific Metals Co. v. Tracy-Collins Bank & Trust Co., 21 Utah 2d 400, 446 P.2d 303 (1968).

[87]Deer Island Fish & Oyster Co. v. First Nat'l Bank, 166 Miss. 162, 169, 146 So. 116, 117 (1933).

[88]*Id.*

[89]*See, e.g.,* Jackson v. First Nat'l Bank, 55 Tenn. App. 545, 403 S.W.2d 109 (1966).

ance with the payee's orders as evidenced by his indorsement.[90] A drawer is entitled to have the drawee recredit his account for the amount of the improper payment on the basis of his implied contract with the payor bank.[91]

B. Liability of Collecting Banks

1. Actions by Payees

Commentators have submitted that the UCC does not specifically provide for a right of action in the payee against the collecting bank for cashing a check over the payee's unauthorized indorsement. Such actions, according to the general consensus, could be maintained if authorized by prior law.[92]

Conversion occurs when a check is *paid* over a forged indorsement.[93] Only a payor bank "pays" a check. A collecting bank may "cash" a check or present it to the drawee for payment, but the collecting bank does not "pay" a check. Therefore, it may be said that the Code does not technically apply to a collecting bank cashing a check bearing a forged indorsement.

Although the Code does not affirmatively vest the payee with an action against the collecting bank, it does appear that the possibility of some type of action is contemplated. Subsections (3) and (4) of § 3-419 contain express restrictions on the liability of a collecting bank. It would seem logical that an action is available against the collecting bank, otherwise the statutory language would be meaningless.

As to the nature of the action that may be brought against the collecting bank, the conversion theory could be as easily applied to a collecting bank as it is applied to a payor bank. Prior to the Code, conversion was a viable theory in several jurisdictions for a payee to predicate an action against the collecting bank.[94]

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[90]*See* Commercial Nat'l Bank & Trust Co. v. Hughes, 243 Miss. 252, 137 So. 2d 800 (1962); Deer Island Fish & Oyster Co. v. First National Bank, 166 Miss. 162, 146 So. 116 (1933).

[91]Oxford Prod. Credit Ass'n v. Bank of Oxford, 196 Miss. 50, 16 So. 2d 384 (1944); Deer Island Fish & Oyster Co. v. First Nat'l Bank, 166 Miss. 162, 146 So. 116 (1933).

[92]Ervin v. Dauphin Deposit Trust Co., 38 Pa. D. & C.2d 473, 3 UCC REP. SERV. 311 (Pa. C.P. Dauphin County December 6, 1965); BAILEY, BRADY ON BANK CHECKS, *supra* note 11, § 15.14, at 499.

[93]UCC § 3-419 (1) (c).

[94]BRITTON, BILLS AND NOTES, *supra* note 28, § 147, at 424.

Although conversion is the simpler and sounder approach, an action could also be maintained under the UCC on the ratification theory. There is an explicit provision in the Code permitting any unauthorized signature to be ratified.[95] The ratification theory proceeds on the assumption that a payee may elect to ratify the collecting bank's collection of the item from the payor bank; the collecting bank is deemed to be acting as the payee's agent in collecting the proceeds of the check.[96] After ratification by the payee, the collecting bank is treated as still having the funds in its hands which belong to the true owner—the payee.[97]

Most decisions to date, arising under the UCC, have permitted the payee to institute actions directly against collecting banks. Courts have utilized the conversion theory, the ratification theory, and have also resorted to prior law to ascertain the propriety of the action.[98] In Mississippi, a payee's action against a collecting bank was permissible under pre-Code law although it is not clear as to the exact nature of the action.[99]

Once it is established that a payee may sue a collecting bank, a different measure of liability is prescribed by the Code. Drawee banks are absolutely liable for the face amount of the check.[100] A depositary or collecting bank's liability is limited to the amount of proceeds re-

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[95]UCC § 3-404 (2) provides:

> Any unauthorized signature may be ratified for all purposes of this Article. Such ratification does not of itself affect any rights of the person ratifying against the actual signer.

[96]*See* Schaap v. State Nat'l Bank, 137 Ark. 251, 208 S.W. 309 (1918); Forman v. First Nat'l Bank, 66 Misc. 2d 432, 320 N.Y.S.2d 648 (1971).

[97]BRITTON, BILLS AND NOTES, *supra* note 28, § 147, at 423.

[98]Harry H. White Lumber Co. v. Crocker-Citizens Nat'l Bank, 253 Cal. App. 2d 368, 61 Cal. Rptr. 381 (1967); Salsman v. National Community Bank, 102 N.J. Super. 482, 246 A.2d 162 (1968); Gast v. American Cas. Co., 99 N.J. Super. 538, 240 A.2d 682 (1968); Forman v. First Nat'l Bank, 66 Misc. 2d 432, 320 N.Y.S.2d 648 (1971); Belmar Trucking Corp. v. American Trust Co., 65 Misc. 2d 31, 316 N.Y.S.2d 247 (1970); Gresham State Bank v. O. & K. Constr. Co., 231 Ore. 106, 370 P.2d 726 (1962); Ervin v. Dauphin Deposit & Trust Co., 38 Pa. D. & C.2d 473, 3 UCC REP. SERV. 311 (Pa. C.P. Dauphin County December 6, 1965). *See generally* Annot., 100 A.L.R.2d 670 (1965).

[99]Kaplan v. Deposit Guar. Nat'l Bank, 192 So. 2d 391 (Miss. 1966); Commercial Nat'l Bank & Trust Co. v. Hughes, 243 Miss. 252, 137 So. 2d 800 (1962); Thomas v. First Nat'l Bank, 101 Miss. 500, 58 So. 478 (1912).

[100]UCC § 3-419 (2).

maining in its hands.[101] A collecting bank must have dealt with the instrument in good faith and in accordance with the reasonable commercial standards of its business as a prerequisite to invocation of this exculpatory provision.[102]

In *Mississippi Bank & Trust Co. v. County Supplies & Diesel Service, Inc.*[103] the Mississippi Supreme Court held that a payee is entitled to recover from a collecting bank that has cashed a check over a forged indorsement. Section 3-419 (3), restricting the liability of collecting banks, was not mentioned. Reliance was based exclusively on the pre-Code case of *Thomas v. First National Bank.*[104] Apparently the court overlooked this salient statute. A collecting bank attempting to utilize this exonerating provision in a future case should not be foreclosed by the decision.

It should be observed that § 3-419 (3) applies to a representative having dealt with the instrument.[105] It has been held that a collecting bank, cashing a check over a forged indorsement, is not acting as a representative within the meaning of § 3-419 (3).[106] Therefore, the limitation of liability prescribed in § 3-419 (3) has no applicability in a subsequent action by the payee. The results would be the same even if the collecting bank acted solely as a representative in collecting payment. After the collecting bank obtained payment from the payor bank, the collecting bank would continue to have all of the proceeds of the

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[101]UCC § 3-419 (3). This section provides, in part:

> [A] representative, including a depositary or collecting bank, who has in good faith and in accordance with the reasonable commercial standards applicable to the business of such representative dealt with an instrument or its proceeds on behalf of one who was not the true owner is not liable in conversion or otherwise to the true owner beyond the amount of the proceeds remaining in his hands.

[102]*Id. See generally* Salsman v. National Community Bank, 102 N.J. Super. 482, 246 A.2d 162 (1968).

[103]253 So. 2d 828 (Miss. 1971).

[104]101 Miss. 500, 58 So. 478 (1912).

[105]*Compare* Ervin v. Dauphin Deposit Trust Co., 38 Pa. D. & C.2d 473, 3 UCC REP. SERV. 311 (Pa. C.P. Dauphin County December 6, 1965) *with* Belmar Trucking Corp. v. American Trust Co., 65 Misc. 2d 31, 316 N.Y.S.2d 247 (1970) *and* Salsman v. National Community Bank, 102 N.J. Super. 482, 246 A.2d 162 (1968).

[106]Ervin v. Dauphin Deposit Trust Co., 38 Pa. D. & C.2d 473, 3 UCC REP. SERV. 311 (Pa. C.P. Dauphin County December 6, 1965).

"Representative" is defined as including "an agent, an officer of a corporation or association, and a trustee, executor or administrator of an estate, or any other person empowered to act for another." UCC § 1-201 (35).

checks remaining in its hands. Under this hypothesis the entire argument as to the applicability of § 3-419 (3) would be academic.

When a collecting bank accepts a check for deposit by providing a provisional credit to the forger's account the bank is acting as a representative.[107] In these circumstances the collecting bank is acting as an agent for collection and the exonerating provision of § 3-419 (3) would be applicable.

In *Belmar Trucking Corporation v. American Trust Co.*[108] an insurance company delivered a check to an insurance broker which was payable to the order of joint corporate payees. After procuring the genuine indorsement of one of the corporate payees, the broker forged the indorsement of the other corporate payee and deposited the check into his personal account at the depository-collecting bank, who obtained final payment from the payor bank. Although not stated in the opinion, the insurance broker had apparently checked out the proceeds from his account and was financially unable to restore the money to the payee or the bank.

In an action by the defrauded payee against the collecting bank the exculpatory provision of § 3-419 (3) was found not to be an available defense to prevent the payee's recovery of the face amount of the check. Two elements must be present before the protective statute may be invoked for a collecting bank acting as a representative: (1) good faith in dealing with the instrument; and (2) conduct in accordance with the reasonable commercial standards of the collecting bank's business. Finding the bank to have acted in good faith in accepting the check for deposit, the court held that the bank had not dealt with the instrument in a commercially reasonable manner. The commercially unreasonable conduct was the collecting bank's breach of its duty to inquire into the authority of the insurance broker to indorse the check on behalf of the corporate payee. It was observed by the court that

> Generally speaking, the proceeds of a check payable to a corporate payee constitute . . . a corporate asset which may not be diverted to a noncorporate purpose. In the normal course of business such checks are deposited for collection in corporate bank accounts and the proceeds of their collection are available for the purpose of meeting corporate obligations.[109]

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[107] UCC § 4-201 (1).

[108] 65 Misc. 2d 31, 316 N.Y.S.2d 247 (1970).

[109] 316 N.Y.S.2d at 251 (1970).

> [We take] judicial notice of the fact that it is not normal business practice for a corporate payee of checks to endorse them in blank and deliver them to third persons in the absence of an appropriate reason and pursuant to appropriate corporate authorization. Customarily, such reason and authorization are stated in the form of a corporate resolution.[110]

Although the UCC embodies a definition of good faith,[111] there is no import ascribed to the phrase "in accordance with the reasonable commercial standards applicable to the business of such representative . . . ." Each court can fashion its own rules and is left free to rely on prior law in framing an interpretation. One commercially reasonable practice, dictated by some courts, necessitates a duty on the collecting bank to inquire into the authority of one to indorse on behalf of the payee. It has been said that the duty is not absolute but applies in circumstances which may be described as suspect.[112]

As previously noted, suspicious circumstances may arise in the case of a corporate payee.[113] It was held in one case that the duty arises when a check bears a prior restrictive indorsement and there is nothing to indicate apparent authority in the one who presented the check for deposit to indorse on behalf of the payee or special indorsee.[114] It

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[110] *Id.* at 251-52.

The court indicated that a bank may not rely solely on a corporate resolution in all cases but may be required to conduct further inquiries concerning the authority of one to indorse on behalf of the corporate payee.

> It should not be inferred . . . that it is intended as a generalization that in all circumstances the delivery of a corporate resolution concludes the need for further inquiry. There may be situations in which the form or substance of the resolution or the source of circumstances of its submission may suggest the desirability of further inquiry. Suffice it to say in the instant case there was no inquiry. Reason and authorization for the deposit of the check for collection were not established by the fact that the [insurance broker] was one of the bank's depositors. Reasonable commercial practice required, at the very least, in the process of inquiry, a request for and the receipt of an appropriate corporate resolution, duly certified. In the present fact situation it is not necessary to determine whether certification standing alone, had such a corporate resolution been submitted, would have been authentication or authorization. *Id.* at 254.

[111] UCC § 1-201 (19).

[112] Salsman v. National Community Bank, 102 N.J. Super. 482, 246 A.2d 162 (1968).

[113] Belmar Trucking Corp. v. American Trust Co., 65 Misc. 2d 31, 316 N.Y.S.2d 247 (1970).

[114] Salsman v. National Community Bank, 102 N.J. Super. 482, 246 A.2d 162 (1968).

There are other cases, decided under the UCC, indicating that a bank has a duty to inquire into the authority of one cashing or depositing a check to indorse on behalf of the payee. *See* Fargo Nat'l Bank v. Massey Ferguson, Inc., 400 F.2d 223 (8th

will remain to be seen how far the courts will carry the duty of a bank to conduct an inquiry so that the bank's conduct is considered commercially unreasonable. There should be no duty imposed upon a subsequent collecting bank in the collection chain; the duty should only exist on the bank first taking the check for collection or deposit from the wrongdoer.

In *Mississippi Bank & Trust Co.* the court observed that the collecting bank made no inquiry into the agent's authority to indorse on behalf of the corporate payee.[115] Perhaps the court was hinting that a collecting bank does have such a duty. Several pre-Code cases contain dicta that there is a duty to inquire.[116] Clouding the overall resolution to the question of whether § 3-419 (3) is not applicable upon a bank's failure to inquire, is the absence of any citation to the UCC regarding the collecting bank's liability to the payee.

2. Actions by Drawers

There are no provisions in the UCC conferring a drawer with a right of action against a collecting bank for payment of a check bearing the forged indorsement of the payee.[117] Massachusetts first recognized this absence of a statutory endowment in the drawer in *Stone and Webster Engineering Corp. v. First National Bank & Trust Co.*[118] Section 3-419 (1) (c) was said to apply only to payor banks, not to collecting banks. Recognizing the language of § 3-419 (3), limiting the liability of collecting banks, the court observed that the Code does not delineate to whom the collecting bank is liable. Consequently the

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Cir. 1968); Wright v. Bank of California, Nat'l Ass'n, 276 Cal. App. 485, 81 Cal. Rptr. 11 (1969) (although § 3-505 does not create a duty upon a drawee bank to conduct an inquiry, there is such a duty where a check, for a substantial sum, is presented in exchange for a cashiers check); Pacific Indem. Co. v. Security First Nat'l Bank, 248 Cal. App.2d 75, 56 Cal. Rptr. 142 (1967); Barden & Robeson Corp. v. Tompkins County Trust Co., 67 Misc. 2d 587, 324 N.Y.S.2d 543 (1971); Bankers Trust Co. v. Manufacturers Hanover Trust Co., 5 UCC REP. SERV. 168 (N.Y. Spec. Term 1968); Huntingdon County v. First-Grange Nat'l Bank, 20 Pa. D. & C.2d 418 (1959).

[115]253 So. 2d at 829 (Miss. 1970).

[116]Commercial Nat'l Bank & Trust Co. v. Hughes, 243 Miss. 252, 137 So. 2d 800 (1962); Citizens Bank v. Miller, 194 Miss. 557, 11 So. 2d 457 (1943); Hart v. Moore, 171 Miss. 838, 158 So. 490 (1935); Thomas v. First Nat'l Bank, 101 Miss. 500, 58 So. 478 (1912).

[117]CLARKE, BAILEY AND YOUNG, *supra* note 5, 165-67. As previously noted, liability for payment of a check bearing a forged indorsement is predicated in conversion under the UCC. The Code simply states in § 3-419 that "(1) An instrument is converted when (c) it is paid on a forged indorsement."

[118]345 Mass. 1, 184 N.E. 2d 358 (1962); *see* Annot., 99 A.L.R.2d 628 (1965).

rights of the drawer must be gleaned from pre-Code law to ascertain the propriety of such actions against the collecting bank.[119] Finding that prior Massachusetts law precluded the action, the collecting bank's demurrer to the drawer's complaint was sustained.[120]

Refusing such actions, according to the Massachusetts Court, is based on the underlying policies of the UCC. A drawer can request the payor bank to recredit his account for the improper payment.[121] There are several defenses available to a payor bank which may obviate any recovery by the drawer.[122] If the drawee bank must ultimately recredit its customer's account, the payor bank may obtain restitution from the collecting bank.[123] However, a waiver or failure to assert defenses by the payor bank against the drawer bars the payor's restitution from the collecting bank.[124] By allowing a direct action against the collecting bank, the effect of these Code defenses may be thwarted or eviscerated.[125]

It has also been argued that the drawer should not be entitled to maintain a direct action due to the different ways the drawer and payee

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[119]Discussing the permissibility of a drawer's direct action, the court, observing that § 3-419 (3) limited the collecting bank's liability, said:

> But there is not explicit provision in the Code purporting to determine *to whom* a collecting bank may be liable, and consequently, the drawer's right to enforce such liability must be found elsewhere. Therefore, we conclude that the case must be decided on our own law, which, on the issue we are discussing, has been left untouched by the Uniform Commercial Code in any specific section. (Emphasis supplied)

[120]*See* Murphey, *Uniformity, Forged Indorsements and Comprehension—Some observations on the Uniform Commercial Code for Mississippi,* 35 MISS. L.J. 356, 371-73 (1964); 4 B.C. IND. & COM. L. REV. 449 (1969).

[121]*See* UCC § 4-401 (1).

[122]*See* UCC §§ 4-406, 3-404, 3-406.

[123]*See* UCC §§ 3-417 (1), 4-207 (1).

[124]UCC § 4-406 (5).

[125]It is also stated that a check is the property of the holder and not the drawer. Consequently, the drawer cannot enforce payment to him by a collecting bank. 345 Mass. 1, 184 N.E.2d 358 (1962).

The pre-Code rule applied by the Massachusetts Court is a minority position. Most jurisdictions follow the English view enunciated in North & South Wales Bank v. McBeth, 77 L.J.K.B. (n.s.) 464 (1908), allowing drawers of negotiable instruments to maintain direct actions against collecting banks. Commercial Credit Corp. v. Citizens Nat'l Bank, 150 W. Va. 196, 144 S.E.2d 784 (1965). *See* Railroad Bldg., Loan & Sav. Ass'n v. Bankers Mortgage Co., 142 Kan. 564, 51 P.2d 61 (1935); Annot., 102 A.L.R. 145 (1936).

It has been stated by one commentator that the majority rule denies direct actions by drawers against collecting banks. BRITTON, BILLS AND NOTES, *supra* note 28, § 144.

are damaged when a check is cashed over the payee's unauthorized indorsement by a collecting bank.[126] In the case of a payee, the collecting bank precludes the true owner from enforcing the check which is presumed to be a direct injury. On the other hand, a drawer is considered to suffer no injury when the collecting bank cashes the check for the forger. Even when the payor bank remits the proceeds to the collecting bank, the drawer has not been injured inasmuch as the payor bank may never charge the item to its customer's account by rejecting the instrument and protecting the drawer. If, however, the payor bank debits the improper item to the drawer's account, injury occurs to the drawer. This injury is considered insignificant at that time, since the drawer may demand that the charge be reversed provided the request is made within three years.[127]

The Massachusetts interpretation of the UCC, denying direct actions by drawers against collecting banks, appears to be an eroding concept.[128] California was the first jurisdiction razing the barrier to such suits under the Code.[129] A drawer was permitted to maintain a direct action against the collecting bank for payment of a check containing the payee's forged indorsement. The action was in contract based on the collecting bank's breach of its warranty of good title to the drawee which was extended to the drawer by implication. On principles of third party beneficiaries the drawer was said to be entitled to enforce the collecting bank's warranties extended to the payor bank.[130]

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[126]Allied Concord Financial Corp. v. Bank of America Nat'l Trust & Sav. Ass'n., 275 Cal. App. 2d 1, 80 Cal. Rptr. 622 (1969).

[127]UCC § 4-406 (4). This section bars a drawer from asserting a forged indorsement as a grounds for recrediting his account if notice of the improper indorsement has not been conveyed to the payor bank within three years after his bank statement and cancelled checks, containing the forged check, were made available to him.

[128]Allied Concorn Financial Corp. v. Bank of America Nat'l Trust & Sav. Ass'n, 275 Cal. App. 2d 1, 80 Cal. Rptr. 622 (1969). *See also,* Prudential Ins. Co. v. Marine Nat'l Exchange Bank, 315 F. Supp. 520 (E.D.Wis. 1970).

[129]Allied Concord Financial Corp. v. Bank of America Nat'l Trust & Sav. Ass'n, 275 Cal. App. 2d 1, 80 Cal. Rptr 622 (1969). This case is discussed in BAILEY, BRADY ON BANK CHECKS, *supra* note 11, § 15.13, at 147-8.

[130]The court said, very persuasively, that:

> The modern trend of procedure looks on circuity of action with disfavor. Privity of contract is no longer a bar to suit.
>
> Likewise the right of third party beneficiaries to directly enforce promises made and obligations assumed for their benefit has been extensively recognized, both substantively and procedurally.
>
> On third party beneficiary principles we think the benefit of warranties given by a bank which negotiates [*sic*] a check on a forged indorsement extends by implication to the drawer of the check.
>
> 80 Cal. Rptr. at 624 (1969).

Policy considerations played an integral role in permitting the action to be maintained. Prominent on the surface of the decision is the desirable objective of avoiding circuity of action.

> By allowing direct suit we reduce circuity of action and make litigation easier between parties located in different jurisdictions. Obviously, procedural difficulties are avoided by permitting direct suit by a drawer, who suffered loss, against depositary banks, the party who first honored the forged indorsement.[131]
>
> Settlement in one lawsuit of all aspects of a controversy involving commercial paper is clearly one of the prime objectives of the [Uniform] Commercial Code.[132]

With the exception of the theory enunciated by the California court, the viability of direct actions by drawers will hinge on pre-Code law.[133] There have been no cases in Mississippi involving a direct action by the drawer against the collecting bank. Several pre-Code cases contain dictum that would appear to sanction such actions.[134] If such a case is presented in the future, the Mississippi Court is free to write on a clean slate. It is hoped that there will be adherence to the impressive analysis of the California Court.

It has been held that the action must be brought in conformity with § 4-406 (4).[135] A drawer will, therefore, have to comply with the notice provision applicable to forged indorsements. This will require notice to be conveyed to the payor bank within three years. Failure to convey notice will bar the action.

C. Defenses Available to Payor and Collecting Banks

1. Authority to Indorse

All of the theories of liability for handling checks bearing forged indorsements previously discussed proceed on the assumption that the indorsement of the payee or special indorsee is not to be treated in law as his indorsement. A defense to any of these actions, available to either the payor or collecting bank, would be that the indorsement

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[131]80 Cal. Rptr. at 624 (1969).

[132]*Id.*

[133]*See* Prudential Ins. Co. v. Marine Nat'l Bank, 315 F. Supp. 520 (E.D.Wis. 1970); Commercial Credit Corp. v. Citizens Nat'l Bank, 150 W. Va. 196, 144 S.E.2d 784 (1965); CLARKE, BAILEY AND YOUNG, *supra* note 5, 167.

[134]Deer Island Fish & Oyster Co. v. First Nat'l Bank, 166 Miss. 162, 146 So. 116 (1933); Thomas v. First Nat'l Bank, 101 Miss. 500, 58 So. 478 (1912).

[135]Allied Concord Financial Corp. v. Bank of America Nat'l Trust & Sav. Ass'n, 275 Cal. App. 2d 1, 80 Cal. Rptr. 622 (1969).

in issue was legally effective as that of the person whose indorsement it purported to be, or at least should be so treated as against the particular plaintiff in the action. The Code defines "unauthorized signature" as one made "without actual, implied or apparent authority,"[136] but it does not define these terms and thus compels adversion to the common law of agency.[137] Theories of liability not resting on Code provisions would presumably also call for application of the common law of agency to determine whether a signature is to be treated as effectively that of the person whose signature it purports to be.

According to the law of agency, actual authority embodies both express and implied authority. Express authority results from manifestations by a principal to his agent.[138] Implied authority inures from authority which is implied from a general grant of express authority.[139] Apparent authority arises from conduct of the principal which would reasonably lead a third person to believe that the agent's conduct is authorized.[140] While actual authority is based exclusively on manifestations to the agent, apparent authority is grounded on some third party's belief that such authority exists. Such belief may come from words, conduct, or acquiesence of the principal.[141]

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[136]UCC § 1-201 (43). In *Mississippi Bank & Trust Co. v. County Supplies & Diesel Service, Inc.* the facts stipulated that the agent had neither real or apparent authority to indorse the warrant on behalf of his principal. 253 So.2d at 829 (Miss. 1970). In a future case the presence of real or apparent authority could be significant to the outcome of the controversy.

[137] UCC § 1-103 provides:

> Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, *principal and agent,* estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions. (Emphasis Supplied)

[138]See Restatement (Second) of Agency § 7 and comment *c* (1958) [hereinafter cited as Restatement]; W. Seavy, Handbook on The Law of Agency § 8, at 12 (1964) [hereinafter cited as Seavy, Agency].

[139]*See* Seavy, Agency, *supra* note 138, § 8 at 13.

[140]*Id.*; Restatement, *supra* note 138, § 8. Apparent authority, as defined by the Mississippi Supreme Court, occurs where the conduct of the principal is such that persons of reasonable prudence, ordinarily familiar with business practices, dealing with an agent might believe the agent to have the power he assumes. To hold a principal liable for the agent's conduct based on apparent authority, three elements must co-exist: (1) there must be acts or conduct of the principal; (2) reliance thereon by a third person; and (3) a change in the position by such third person to his detriment. Hence, in Mississippi, there is no distinction between apparent authority and an agency by estoppel. Steen v. Andrews, 223 Miss. 694, 78 So. 2d 881 (1955). *See also* Tarver v. J. W. Sanders Cotton Mill, 187 Miss. 111, 192 So. 17 (1939).

[141]Restatement, *supra* note 138, § 7 comment *d*, § 8 comment *e*; Seavy, Agency, *supra* note 138, § 22.

Aside from actual and apparent authority, an agent may also bind his principal by an estoppel.[142] An agency by estoppel occurs from conduct of the principal which leads the third party to treat the agency as one of fact. In addition, one claiming an estoppel must have changed his position in reliance on the agency, an element not mandated in apparent authority.[143]

As relating to forged indorsements, there has been a disparity among the various jurisdictions as to the circumstances in which a principal will be estopped on the basis of an agent's apparent authority. Some jurisdictions are liberal[144] in allowing a principal to be lax in controlling and supervising his agents while other jurisdictions have been more restrictive.[145]

The liberal view is represented in a case in which an agent diverted checks over a period of three years payable to the principal's order, supplied the indorsements, and deposited the checks into his personal checking account. It was held that the agent had no apparent authority to permit the indorsements to be deemed authorized by the principal.[146] Mere laxity in supervising an agent has been held by another court as not to be sufficient to protect a bank, cashing checks bearing the principal's unauthorized indorsement by the agent, on the basis of an agent's apparent authority.[147]

An example of the more restrictive approach may be gleaned from *Senate Motors, Inc. v. Industrial Bank.*[148] Engaging in the sale of automobiles, the plaintiff had employed an agent who was allowed to retail a car to a purchaser on his own initiative. In these transactions, the agent would sell the car and, before payment of the purchase price by the purchaser, deliver the vehicle. Bank drafts were delivered to the agent, by the defendant bank, representing loans to the respective purchasers for the balance of the purchase price of the automobile.

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[142]SEAVY, AGENCY, *supra* note 138, § 8, at 14.

[143]RESTATEMENT, *supra* note 138, § 8, comment *b*.

[144]*See, e.g.*, Fargo Nat'l Bank v. Massey Ferguson, Inc., 400 F.2d 223 (8th Cir. 1968); R. Mars, The Contract Co. v. Massanutten Bank, 285 F.2d 158 (4th Cir. 1960).

[145]Commercial Cas. Ins. Co. v. Isbell Nat'l Bank, 223 Ala. 48, 134 So. 810 (1931); Arcade Realty Co. v. Bank of Commerce, 180 Cal. 318, 181 P. 66 (1919); Senate Motors, Inc. v. Industrial Bank, 9 UCC REP. SERV. 387 (D.C. Super. Ct. July 2, 1971); *see* O'Malley, *Common Check Frauds, supra* note 2, 237 and n. 299.

[146]Fargo Nat'l Bank v. Massey Ferguson, Inc., 400 F.2d 223 (8th Cir. 1968). *See* Industrial Plumbing & Heating Supply Co. v. Carter County Bank, 25 Tenn. App. 168, 154 S.W.2d 432 (1941).

[147]R. Mars, The Contract Co. v. Massanutten Bank, 285 F.2d 158 (4th Cir. 1960).

[148]9 UCC REP. SERV. 387 (D.C. Super. Ct. July 2, 1971).

The drafts were drawn payable to the plaintiff. These checks were indorsed by the agent and deposited into his personal checking account at the defendant bank, the agent's personal check being given to the principal for payment of the outstanding balance of the respective purchaser. Over a period of thirty-four months, on at least ninety-five occasions, the agent pursued this practice. The agent failed to account to his principal for three transactions after the bank had delivered checks to the agent which were payable to the principal and deposited into the agent's personal checking account. An action was instituted by the principal against the depository-collecting bank.

The court found that the principal was estopped from denying its indorsement by the agent. The persuasive factors were that this was an established practice permitted by the payee, that the payee had knowledge of the loans, and due to the extended time this practice was allowed to persist, a resulting duty was cast upon the principal to notify the bank of the lack of the agent's authority to indorse. In the absence of such notification the bank could reasonably assume that the agent had authority for his conduct. As to negligence the court said:

> [N]egligence is not, in this area, a broad doctrine but, as applied to a payee in respect of a non-restrictive endorsement, is limited to careless conduct by the payee which proximately and substantially contributes and relates to the creation of apparent authority in the endorser.[149]

2. Ratification and Estoppel : § 3-404

While an unauthorized signature is *wholly inoperative* it may be *ratified* or the person whose name has been signed on the instrument may be *precluded* from asserting the surreptitious signing.[150] There is a conflict of authority in the common law of agency as to whether a forged signature may be ratified.[151] This controversy is resolved in the Code by permitting such signatures to be ratified, but only for "all purposes of this Article."[152]

Ratification and a preclusion are defenses which obviously apply in cases arising under express provisions of the Code. However, some actions against payor and collecting banks may be based on non-Code principles. In these cases a court could adopt the defenses in § 3-404.

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[149] *Id.* at 391.

[150] UCC § 3-404 (2).

[151] BRITTON, BILLS AND NOTES, *supra* note 28, § 128.

[152] UCC § 3-404 (2).

Assuming a court does not apply the Code defenses, in a case based on a non-Code theory, ratification was recognized in the common law of agency, at least where the unauthorized indorser purported to be an agent.[153] There was also a preclusion, in the sense of an estoppel, to deny the genuineness of a signature which was embedded in the common law.[154]

Generally ratification vindicates unauthorized conduct by an agent[155] and the transaction has the same effect as if the conduct were previously authorized.[156] Traditionally, a valid ratification requires that the principal have knowledge of the essential facts. An acceptance of a transaction with the principal's knowledge of the facts constitutes a ratification. There is no need for a formal acceptance as such. Acceptance of the benefits of or acquiescence in a transaction is sufficient.[157]

Insight into the interpretation and application of a ratification in the UCC may be obtained from the comments to § 3-404.[158] It is stated that an unauthorized signature may be adopted. Ratification is used to make explicit that the adoption is to be retroactive to the date of the transaction. Conduct as well as express representations may give rise to a ratification. Although a forger does not have to be a technical agent of the individual whose signature is forged, a purported ratification is, nevertheless, to be governed by principles of agency.

An example of a ratification contained in the comments is the retention of benefits of a transaction with knowledge of the forgery. In *Starkey Construction Co. v. Elcon, Inc.*[159] checks were paid over the forged indorsements of several joint payees. Ratification was found to bar recovery by the drawer against the payor bank. Payment was separately tendered to some of the defrauded payees by the forger and credit was extended to the forger by the remaining defrauded payees.

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[153]BRITTON, BILLS AND NOTES, *supra* note 28, § 128.

[154]*Id.*

[155]*See, e.g.*, Baker & Vardeman v. Byrne, Herman & Co., 10 Miss. (2 S. & M.) 193 (1844).

[156]RESTATEMENT, *supra* note 138, § 83; SEAVY, AGENCY, *supra* note 138, §§ 32-41. *See also* Gulf Refining Co. v. Travis, 201 Miss. 336, 30 So. 2d 398 (1947); *see generally* annot., 100 A.L.R.2d 670, 678 (1965); 150 A.L.R. 978 (1948); 144 A.L.R. 1440 (1943).

[157]R. T. Polk Cotton Co. v. Bethel, 136 Miss. 154, 96 So. 305 (1923); Thurmond v. Carter, 59 Miss. 127 (1881); Vicksburg & M. R.R. v. Ragsdale, 54 Miss. 200 (1876); Meyer v. Morgan, 51 Miss. 21 (1875); *see* RESTATEMENT, *supra* note 138, §§ 93-99; SEAVY, AGENCY, *supra* note 138, §§ 36-38.

[158]UCC § 3-404, Comment 3.

[159]248 Ark. 958, 457 S.W.2d 509 (1970).

Therefore, the defrauded payees had ratified their unauthorized indorsements.[160]

According to the comments, an estoppel, denoted as a preclusion in the parlance of the Code, is to include both negligence and express representations that a surreptitious signature is genuine.[161]

3. Negligence: § 3-406

Another example of a situation in which one will be precluded from proving a signature is not genuine is found in § 3-406. This section provides that one will be precluded from asserting his unauthorized signature if his negligence substantially contributed to the placement of the signature on the check. This is a codification of *Young v. Grote*[162] which was not recognized in Mississippi prior to the adoption of the UCC.[163] It should be kept in mind that a court could adopt the Code's defense of negligence in a forged indorsement case based on principles contained outside of the UCC.

No definition is provided in the Code as to when negligence substantially contributes to the making of an unauthorized signature. According to the comments, the question is to be resolved by the jury based on the facts and circumstances of each case.[164]

Several cases illustrate the application of § 3-406. In *Gresham State Bank v. O. & K. Construction Co.*[165] a bookkeeper, employed by the plaintiff company, had access to a rubber stamp which printed the name and address of the plaintiff. Upon receiving certain checks, payable to the company, the bookkeeper stamped the checks impressing the company name thereon and signed his name below. These checks were cashed at a nearby store. No inquiry was conducted by the defendant store owner concerning the bookkeeper's authority to indorse and cash the checks. The court noted that § 3-406 would not preclude the assertion of the unauthorized indorsements unless two conditions were present: (1) the plaintiff's negligence substantially contributed to the mak-

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[160]*See* Davis Aircraft Prod. Co. v. Bankers Trust Co., 36 App. Div. 2d 705, 319 N.Y.S.2d 379 (1971) (drawer's signature forged on one account and proceeds deposited in another bank where the drawer maintained a second account—held drawer had ratified the unauthorized signature by retaining the proceeds). *See also* Wiest v. National Bank, 10 Lycoming R. 125 (Pa. 1966); Rehring v. Fortunak, 39 Pa. D. & C.2d 20 (Pa. 1966).

[161]UCC § 3-404, Comment 4.

[162]4 Bing. 253, 130 Eng. Rep. 764 (1827).

[163]Simmons v. Atkinson & Lamaton Co., 69 Miss. 862, 12 So. 263 (1892).

[164]UCC § 3-406, Comment 3.

[165]231 Ore. 106, 370 P.2d 726 (1962).

ing of the unauthorized indorsements; and (2) the store paid the check in good faith according to the reasonable commercial standards of its business.

For failing to discover the surreptitious indorsements the company was found negligent within the purview of § 3-406. The bookkeeper's chicanery had continued undetected for over three years and the company could have unveiled the fraudulent scheme by comparing the deposits on its bank statements against the payments by its various customers. However, the defendant store was found, as a matter of law, not to have paid the checks in accordance with the reasonable commercial standards of its business in failing to inquire into the authority of the bookkeeper to indorse the checks. As between a negligent payor and a negligent principal, the payor was required to bear the loss precipitated by the bookkeeper's unauthorized indorsements of his principal. It was held that § 3-406 requires "a weighing process in choosing between the owner of the forged instrument and the payor in allocating the loss."[166]

In *Gresham State Bank v. O. & K. Construction Co.*, there was a misapplication of § 3-406. Section 3-406 is expressly available in favor of only two classes: (1) holders in due course, and (2) "a drawee or other payor who pays the instrument in good faith and in accordance with the reasonable commercial standards of the drawee's or payor's business." Since the checks contained unauthorized indorsements, the store could not have been a holder in due course.[167] In cashing the checks the store was not a "payor," rather the store was merely a transferee. Consequently, it could not claim protection under § 3-406. In forged indorsement cases § 3-406 will only be available to a "drawee or payor,"[168] assuming that payment is in good faith and according to reasonable commercial standards.[169]

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[166]370 P.2d at 732.

[167]See *supra* notes 69-71.

[168]There is no definition of "payor" contained in the UCC. "Payor bank" is defined as "a bank by which an item is payable as drawn or accepted." UCC § 4-105(b). In the comments it is stated that § 3-406 is to apply to payors who may not technically be drawees. UCC § 3-406, Comment 2. The term "payor" seems to imply one who is discharging a legal obligation he has on the check or one who is fulfilling some duty he has with respect to the check. This would practically exclude all parties enumerated in § 3-406 except a drawee bank and would never apply to a transferee of an instrument.

[169]Several courts have held reasonable commercial standards dictate an inquiry by the bank into the authority of the one presenting the check for deposit or cashing to indorse on behalf of the payee. *See, e.g.*, Salsman v. National Community Bank, 102 N.J. Super. 482, 246 A.2d 162 (1968); Gresham v. O. & K. Constr. Co., 231 Ore. 106, 370 P.2d 726 (1962).

The courts have failed to recognize the limitation of § 3-406. Several cogent arguments could be framed to overcome the obstacle of the applicability of § 3-406 to transferees in forged indorsement cases. It could be urged that "holder in due course," as used in § 3-406, does not refer to a holder in due course in the strict sense but refers to one in the broader sense that takes the instrument in good faith and without knowledge of the unauthorized indorsement.[170] It could also be argued that although there is an estoppel in the circumstances denoted in § 3-406 this does not necessarily prevent an estoppel from arising in other situations, the Code being regarded as silent on the issue.[171]

Negligence has played a more viable role in actions by drawers against payor banks. This may be seen from *Thompson Maple Products v. Citizens National Bank*,[172] a well-known decision under the UCC. Logs were purchased by the plaintiff from various timber owners. Local truckers transported the logs for the timber owners to the plaintiff's mill. At the mill, duplicate scaling slips were prepared by an employee of the plaintiff which denoted the quality and grade of the logs. In addition, the name of the timber owner was designated on the slip, the name being supplied by the respective trucker. A copy of the scaling slip was to be given to the trucker and the original transmitted to the plaintiff's bookkeeper, who prepared a check payable to the timber owner named on the slip. Blank sets of scaling slips were often left available on the plaintiff's premises which were easily accessible to the truckers. One trucker procured several pads of scaling slips pretending to need them for scratch pads. These slips were completed and reflected fictitious deliveries of logs coupled with the names of local timber owners as suppliers. Over a substantial period of time the forger delivered the slips to the bookkeeper who drew checks payable to the purported owners. Volunteering to deliver the checks to the payees, the forger persuaded the bookkeeper to entrust the checks to him for delivery. After forging the name of the payees, the forger obtained payment from the drawee bank. After the fraudulent scheme was unraveled, the plaintiff drawer sought to collect the amount of the checks from the drawee which were paid within three years after the plaintiff conveyed notice to the payor bank of the forgeries.

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[170]Certain definitions are contained within the Code which contain the phrase "unless the context otherwise requires." UCC §§ 1-201, and 3-102. In § 3-302, a holder in due course is defined but the definition is not qualified by the phrase "unless the context otherwise requires." Therefore, this approach may not be sound since § 3-302 purports to be an unqualified definition of holder in due course.

[171]UCC § 1-103 states, in part, that the "law relative to . . . estoppel" is to supplement the provisions of the Code.

[172]211 Pa. Super. 42, 234 A.2d 32 (1967).

In finding the drawer negligent in substantially contributing to the forged indorsements the drawee was exonerated for its improper payments. There was a failure of the plaintiff to maintain proper procedures in remitting payments to the timber owners as well as the plaintiff's failure to discover the fraudulent scheme. Construing § 3-406, the court said that the preclusion is not equivalent to an estoppel and, therefore, does not require negligence that is direct and proximate necessitated under pre-Code law. The UCC was stated to have "shortened the chain of causation which the . . . bank must establish."[173]

The rationale of *Thompson Maple Products* has been followed by other courts. In a case involving the subrogee of a drawer against the payor bank the New York court said that the UCC modifies the chain of causation to negligence which contributes substantially to the unauthorized signature.[174]

> [S]ection [3-406] gives statutory sanction to the duty of a drawer to protect the drawee against forgeries, imposes additional duties on a bank's customer and will increase the duty of care owed to the drawee by the one who sets the instrument in motion.[175]

Another court has interpreted § 3-406 in a similar manner to mean that it is the "contribution to forgery rather than the negligence [which] must be substantial" to invoke the preclusion.[176]

Manifestations of negligence which substantially contribute to an unauthorized indorsement arose when a drawer mistakenly mailed a check to the wrong person.[177] In *Gordon v. State Street Bank & Trust Co.*[178] negligence was found in the manner in which the negotiations

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[173]234 A.2d at 34 (1967).

[174]Fidelity & Deposit Co. v. Chemical Bank New York Trust Co., 65 Misc. 2d 619, 318 N.Y.S.2d 957 (1970).

[175]318 N.Y.S.2d at 959 (1970).

[176]Gast v. American Cas. Co., 99 N.J. Super. 538, 240 A.2d 682 (1968). *See also* Gresham State Bank v. O. & K. Constr. Co., 231 Ore. 106, 370 P.2d 726 (1962).

[177]Park State Bank v. Arena Auto Auctions, Inc., 59 Ill. App. 2d 235, 207 N.E.2d 158 (1965). A check was mistakenly mailed by the drawer to one in Illinois who had a name similar to the drawer's creditor in Alabama, the intended payee. The Illinois recipient, knowing he had sold no merchandise to the drawer, indorsed the check and received the proceeds therefrom. A stop order was issued to the payor bank, and the check was not finally paid by the drawee. Subsequently, another check was prepared, payable to the Alabama creditor, and was again mistakenly mailed to the Illinois resident, who cashed the check. Section 3-406 was held to bar the drawer from asserting the forged indorsement against the payor bank; the drawer's conduct was deemed to have substantially assisted in making it possible that an unauthorized indorsement passed title to the funds represented by the check.

[178]9 UCC REP. SERV. 697 (Mass. App. Div. May 6, 1971).

culminating into the preparation of the check were conducted. A man named Wolf had negotiated with the drawer for a loan. A promissory note, prepared by the drawer, was submitted to Wolf and his wife. Wolf signed the note and forged his wife's signature thereto. A check was drawn jointly payable to Wolf and his wife after Wolf had returned the promissory note to the drawer. Wolf indorsed the check forging his wife's indorsement and received payment. After Wolf's death, the drawer contacted the wife concerning the unpaid balance of the note. She denied having any knowledge of the transaction, as well as signing the note and indorsing the check.

In the drawer's action against the drawee bank, the court concluded that the loss should be placed on the drawer. Observing that the drawee bank had no knowledge regarding either payee designated on the instrument, the drawer, as maker of the check, was deemed to have contributed to the perpetration of Wolf's fraudulent scheme. Therefore, the court felt compelled to place the loss on the party whose conduct made the loss possible.

D. Restitution for Payor and Collecting Banks.

Once it is determined, in an action by a drawer or payee, that a payor bank is liable for payment over a forged indorsement, the inquiry necessarily focuses on whether the drawee bank may seek restitution. An affirmative answer is provided in the Code. The payor bank may recover from the customer or collecting bank who obtained payment.[179] In such instances the customer or collecting bank, whichever the case may be, is deemed to have breached its warranty that it had "good title to the [check] or [was] authorized to obtain payment on behalf of one who [had] good title. . . ."[180] Thus, the payor bank is entitled to recover on the basis of the statutory warranty of title and genuineness which accompany payments of checks.[181]

In *Mississippi Bank & Trust Co.* the Mississippi Supreme Court, relying on the warranties of the UCC, held that as between the drawee and collecting banks, the collecting bank must bear the loss. There was a breach of the collecting bank's warranty that it had good title to the

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[179]UCC §§ 3-417 (1) (a), 4-207 (1) (a); *see* Continental Bank & Trust Co. v. American Bank & Trust Co., 217 Pa. Super. 371, 8 UCC Rep. Serv. 1092 (Pa. C.P. Montgomery County November 18, 1970); Security Bank & Trust Co. v. National Bank of Commerce, 8 UCC Rep. Serv. 1086 (Okl. Ct. App. March 9, 1971).

[180]UCC §§ 3-417 (1) (a), 4-207 (1) (a); *see also* UCC § 3-417, Comment 3.

[181]UCC §§ 3-417 (1) (a), 4-207 (1) (a); Franklin Nat'l Bank v. Shapiro, 7 UCC Rep. Serv. 317 (N.Y. Sup. Ct. Nassau County February 9, 1970).

instrument.[182] Commenting on the scope of the warranty, after citing §§ 4-207 (1) (a), (2) (a) and (b), the court said:

> The clear effect of this statute is that [the collecting bank] by transferring [sic] the warrant by its endorsement, after receiving consideration, warranted to [the payor bank], who took the item in good faith, that all signatures were genuine or authorized.[183]

This was a misapplication of the applicable warranty provisions to the facts of the case. Section 4-207 consists of two sets of warranties which apply in different situations and contain different wording. The warranties in § 4-207 (1) are given by a party obtaining payment from the payor bank.[184] On the other hand, the warranties in § 4-207 (2) are given by a transferor to his transferee and arise only upon the transfer of an instrument. These warranties do not run in favor of a payor.[185] A collecting bank or other party obtaining payment from the payor of a check which bears a forged indorsement has given and breached a § 4-207 (1) warranty, not a warranty arising under § 4-207 (2).[186]

Policy considerations have played an integral role in placing the temporary loss on collecting banks. With respect to forged indorsements, a collecting bank is considered to be responsible for the loss. A teller cashing or accepting a check for deposit can with a modicum of care normally ascertain the propriety of the indorsements, or at least ascertain if the check is indorsed.

> [I]n contemporary banking practice . . . checks are processed (once accepted by the teller) by automated, electronically operated equipment without further human intervention. Considering the immense volume of checks drawn against . . .

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[182]253 So. 2d 828 (Miss. 1971).

[183]*Id.* at 830.

[184]CLARKE, BAILEY AND YOUNG, *supra* note 5, 132-133. In providing for a warranty payment of a check the UCC departs from prior law since a payor's recovery was predicated in quasi-contract based on mistake of fact. *See supra* notes 28-30.

[185]CLARKE, BAILEY AND YOUNG, *supra* note 5, at 142.

[186]Other courts have also confused the warranties of §§ 4-207 (1) and (2) treating the two as synonymous. *See, e.g.*, First Pennsylvania Banking & Trust Co. v. Montgomery County Bank & Trust Co., 29 Pa. D. & C.2d 596, 1 UCC REP. SERV. 291 (Pa. C.P. Montgomery County September 17, 1962).

The erroneous application of the warranties in § 4-207 (1) and (2) may be demonstrated in a case involving a forgery of the drawer's signature. A party obtaining payment from the payor only warrants that he has no knowledge that the drawer's signature is unauthorized. UCC §§ 3-417 (1) (b), 4-207 (1) (b). If there is a "transfer" of the instrument there is an unqualified warranty extended to the transferee that all signatures are genuine or authorized. UCC §§ 3-417 (2) (b), 4-207 (2) (b).

> [drawee banks] each working day, it would be casting an impossible burden . . . to examine each instrument individually. Lex no cogit ad impossibilia.[187]

One purpose of the Code is to speed up the collection process of the titanic volume of checks. To require each bank handling the item to meticulously examine each indorsement would result in duplicity of manpower and bog down the collection process. Logic, so it is said, mandates that the first bank taking the item for collection should be held primarily responsible for examining the indorsements and ascertaining if they are proper and authentic.[188]

It should be noted that the Code requires a payor bank, or other party, to make a claim for a breach of warranty within a reasonable time after knowledge of the breach is acquired.[189] Failure to convey a seasonable notice of the claim will discharge the liability of the party obtaining payment by the amount of the loss incurred due to the delay.[190]

It has been determined that the first bank obtaining payment from the payor bank of a check bearing a forged indorsement will, under the UCC, be temporarily liable. This bank can in turn pass its loss back until it comes to rest with the first bank accepting or cashing the check by proceeding for a breach of warranty under § 4-207 (2). Theoretically, each transferee will recover from his transferor through the chain of indorsers until the loss is ultimately placed on the forger. In most instances, the person perpetrating the forgery will not have sufficient funds to reimburse his transferee or has absconded and cannot be found. Allocation of the loss from forged indorsements, for all practical purposes, will be placed on the first party taking the check from the forger.

IV. Nominal Payees

There are instances in which checks bearing the forged indorsement of the payee may be effective and not create liability upon a collecting bank cashing or accepting a check for deposit or a drawee bank's final payment of the check. Specifically, this has reference to nominal payee situations in which the payee's name is but a mere conduit for the forger to obtain the check.[191] There are three classifications presented in the Code depicting nominal payee situations: (1) imposters; (2) fictitious payees; and (3) padded payroll cases. It should be noted that in order

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[187]Continental Bank & Trust Co. v. American Bank & Trust Co., 217 Pa. Super. 371, 8 UCC Rep. Serv. 1092 (Pa. C.P. Montgomery County November 18, 1970).

[188]Federal Deposit Ins. Corp. v. Marine Nat'l Bank, 303 F. Supp. 401, 403 (M.D. Fla. 1969).

[189]UCC § 4-207 (4).

[190]*Id.; See* Clarke, Bailey and Young, *supra* note 5, 144.

[191]2 R. Anderson, Uniform Commercial Code § 3-405:4, at 932 (2d ed. 1971).

for any of the provisions of § 3-405 (1) to come into operation, there must first be an indorsement in the payee's name. A bank accepting a check under circumstances that would otherwise fall within the ambit of § 3-405 (1) looses the protection of the statute when there is no indorsement contained on the instrument.[192] Checks payable to fictitious payees and imposters are order paper and require an indorsement.[193]

A. Imposters: § 3-405 (1) (a)

A check containing the forged indorsement of the payee which was procured by an imposter, through the mail or otherwise, is effective if such impersonator induced the drawer to issue the check to him or his confederate in the payee's name.[194] A well-known case, arising under the UCC, which provides an apt illustration of the operation of the imposter doctrine is *Philadelphia Title Insurance Co. v. Fidelity Philadelphia Trust Co.*[195] It was held that § 3-405 (1) (a) includes cases where the imposter induces the drawer to draw a check, even though there are no direct dealings between the imposter and the drawer. An imposter can use a third party upon whom the drawer relies in issuing the check. The court sounded the death knell to the general pre-Code rule that an imposter must have direct dealings with the drawer as a prerequisite to the invocation of the imposter rule. Authority for the courts decision was based on the phrase that the impersonation may be by the "mails or otherwise."

> [T]he Legislature could not have predicted and expressly included all ingenious schemes designed and carried out by imposters for the purpose of defrauding the . . . drawers of negotiable instruments. Something had to be left to the courts by way of statutory construction. For purposes of imposing the loss on one of two "innocent" parties, either the drawer who was defrauded or the drawee bank which paid out on a forged indorsement, we see no reason for distinguishing between the drawer who is duped . . . directly . . . and a drawer who is duped by an impersonator communicating indirectly with him through third persons.[196]

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[192]Wright v. Bank of California, 276 Cal. App. 2d 485, 81 Cal. Rptr. 11 (1969).

[193]In this respect the UCC limits the fictitious payee rule as it existed under the NIL, notwithstanding the fact that the UCC was intended to expand the coverage of the fictitious payee rule. Under the NIL, checks payable to fictitious payees were bearer paper which could be negotiated without any indorsement. Such instruments under the Code are payable to order which mandates an indorsement in the payee's name, no matter by whom, for the check to be negotiated. UCC §§ 3-116, 3-117, 3-202; Wright v. Bank of California, 276 Cal. App. 2d 485, 81 Cal. Rptr. 11 (1969).

[194]UCC § 3-405 (1) (a).

[195]419 Pa. 78, 212 A.2d 222 (1965).

[196]212 A.2d at 225 (Pa. 1965).

Application of the imposter rule was invoked in *Fidelity & Deposit Co. v. Manufacturers Hanover Trust Co.*[197] to validate a forged indorsement. A savings and loan association issued a check, payable to one of its customers, relying upon a withdrawal order purportedly signed by the customer. However, the customer did not sign or present the withdrawal order. Although it was not clear whether the impersonator was the former husband of the customer or the husband's second wife, the imposter rule was considered applicable in either event.

If the husband's second wife had appeared at the drawer's office, there was an impersonation since she was pretending to be the customer.

Examining the signature on the withdrawal order, the drawer concluded that the signature corresponded with its customer's signature on the account card. If the former husband had presented the withdrawal order, he could have been acting as the agent for his former wife. When one falsely represents that he is the agent of another the imposter rule does not apply. In such cases the drawer intends for the check to be issued and to be the property of the principal and not the agent.[198] The fraud of the agent relates to status and not to identity.[199] Here, however, the court observed that the drawer did not rely upon any representation of agency because a signature comparison was conducted. Contented that the signature on the withdrawal order was its customer's, the drawer gave the check to the former husband. Any false representation of agency was found to be irrelevant since the court felt that the circumstances came within the phrase "or otherwise" in § 3-405 (1) (a). Thus, the drawer intended to deal with the person whose signature was contained on the withdrawal order. Since the husband forged his former wife's signature, he was the one to whom the drawer issued the check. As analyzed by the court, in algebraic forms, the drawer issued a check "to X in A's name; A was really X posing as A; [the drawer] therefore intended to issue the checks to X, albeit in A's name."[200]

It is submitted that the court's reasoning is questionable. If "X" appears with a withdrawal order purportedly signed by "A" and the drawer delivers a check to "X", payable to "A's" order, it cannot be realistically assumed that the drawer intended "X" to be the payee.

In *Franklin National Bank v. Shapiro*[201] the plaintiff bank, both the

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[197]63 Misc. 2d 960, 313 N.Y.S.2d 823 (1970).

[198]*Id.; see* UCC § 3-405, Comment 2.

[199]*See, e.g.,* Franklin Nat'l Bank v. Shapiro, 7 UCC Rep. Serv. 317, 321 (N.Y. Sup. Ct. Nassau County February 9, 1970).

[200]313 N.Y.S.2d at 827 (1970).

[201]7 UCC Rep. Serv. 317 (N.Y. Sup. Ct. Nassau County February 9, 1970).

drawer and drawee, mailed a check jointly payable to a husband and his wife after receiving a promissory note, by mail, containing the purported signature of both parties.

A total of three checks were issued which represented loans evidenced by promissory notes, and all negotiations were conducted by mail. Upon default of the installment payments, the bank conducted inquiries. The husband informed the bank that his wife had died and, furthermore, that he had no knowledge of the loans. After perusing the promissory notes and checks, he stated that his signature and indorsements thereto were forgeries. An action was instituted against the depository and intermediary banks for breach of their warranty of genuineness of all prior indorsements by the drawer-drawee.[202]

Commenting on the scope of § 3-405 (1) (a), the court said:

> [T]he drawer is made to bear the loss irrespective of the method of fraud or media of communication to consumate the deception. The endorsement of the impersonated person's name is effective no matter by whom it is made.[203]

Armed with the basic purpose of the UCC — loss apportionment — the court held that the drawer-drawee was held to bear the loss. By employing a policy of proper diligence and vigilance in granting the loans the bank could have prevented the wife's chicanery.

This decision seems to go against the grain of § 3-405 (1) (a). It is not pragmatic to assume that the wife was pretending to be both herself and her husband. And it is certain that the drawer did not think she was pretending to be both persons.

B. Fictitious Payees: § 3-405(1)(b)

When one signs a check as or on behalf of the drawer intending the payee to have no interest therein, the subsequent forgery of the payee's indorsement does not render the indorsement ineffective.[204] Perhaps "fictitious payees" is a misnomer because the test is not whether the payee is fictitious but rather the intent of the drawer that the payee is to have no interest in the check.[205]

A corporate officer drawing checks intending the payees to have no interest in the proceeds thereof will precipitate invocation of the fictitious

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[202]UCC §§ 3-417 (1), 4-207 (1).

[203]7 UCC REP. SERV. at 321 (N.Y. Sup. Ct. Nassau County February 9, 1970).

[204]UCC § 3-405 (1) (b).

[205]UCC § 3-405, Comment 3.

payee rule. A forgery of the payee's indorsement will be effective for a negotiation or to authorize the drawee bank to pay the instrument.[206]

The question has arisen regarding the application of the fictitious payee rule to checks requiring the signatures of co-makers. A check drawn pursuant to the fraudulent representations of one co-maker, intending the payee to have no interest in the check, to the other co-maker comes with the purview of the fictitious payee rule. This applies even though one co-maker has no knowledge of the fraudulent scheme.[207] Therefore, where the intent of the co-makers are divergent, the loss will be borne by the drawer.[208]

C. Padded Payrolls: § 3-405(1)(c)

If an agent or employee of a drawer provides the name of a payee to be designated on a check, intending the payee to have no interest therein, the subsequent forgery of the payee's indorsement is effective to pass title to the instrument.[209] This rule is to apply not only to the

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[206]May Dep't Stores Co. v. Pittsburg Nat'l Bank, 374 F.2d 109 (3d Cir. 1967); First Pennsylvania Banking & Trust Co. v. Montgomery County Bank & Trust Co., 29 Pa. D. & C.2d 596, 1 UCC Rep. Serv. 291 (Pa. C. P. Montgomery County September 17, 1962).

[207]*See* UCC § 3-405, Comment 3f.

[208]Wright v. Bank of California, Nat'l Ass'n, 276 Cal. App. 2d 485, 81 Cal. Rptr. 11 (1969). *See* Note, *Negotiable Instruments—The Cosignor Problem in Wisconsin—NIL and UCC,* 1961 Wis. L. Rev. 514 where it is stated that the justification for this result lies in the terminology of § 3-405 (1) (b) by the use of the words "a person signing." Therefore, if at least one of the cosignors has the requisite intent that the payee is to have no interest in the check, he is "a person signing" as contemplated by § 3-405 (1) (b).

[209]UCC § 3-405 (1) (c); Jerman v. Bank of America, 7 Cal. App. 3d 882, 87 Cal. Rptr. 88 (1970) (purchaser of cashiers check was found to have intended the payees to have an interest in the check thereby precluding the application of § 3-405 (1) (c)).

A departure from the rule embraced in § 3-405 (1) (c) arose in Delmar Bank v. Fidelity & Deposit Co., 428 F.2d 32 (8th Cir. 1970). A check was delivered to the drawer's agent under circumstances that would seemingly come within the purview of § 3-405 (1) (c). After forging the payee's indorsement, the agent cashed the check at the collecting bank who transferred the check to the payor bank receiving final payment. Upon discovery of the forged indorsements, the drawer made a successful demand on the payor bank to recredit its account. The payor bank obtained restitution from the intermediary bank, who in turn, recovered its loss from the collecting bank. A demand was made by the collecting bank against its insurer on the forgery provisions of its Banker's Blanket Bond. It was held that the bond encompassed checks payable to fictitious payees and, therefore, the insurer was required to indemnify the collecting bank. The insurance company had contended that the collecting bank acted as a volunteer in reimbursing the intermediary bank, thereby creating its own loss since § 3-405 made the forged indorsement effective to pass title to the instrument. Unfortunately the court did not consider this argument since it was not raised in the lower court.

traditional padded payroll case but in any instance when the agent supplies the drawer with the name of the payee.[210]

As a prerequisite to the application of § 3-405 (1) (c), there must be an agency relationship between the one furnishing the name of the payee and the drawer of the check.[211] This is exemplified in a case where two corporations had, on several occasions, made joint loans, each advancing one-half of the proceeds. On one occasion, the president of one of the corporations approached the other, falsely representing that he desired to procure a loan for his brother-in-law. A check was drawn by the defrauded corporation, payable to the brother-in-law, and delivered to the other corporate president. After forging his brother-in-law's indorsement, the president deposited the check in the corporate bank account at the collecting bank. Final payment was remitted to the collecting bank by the payor bank who debited its customer's account. An action was instigated by the drawer against the payor bank. Section 3-405 (1) (c) was found inapplicable and the payor bank was held liable for its payment of the check which bore a forged indorsement. There was no agency relationship found to exist between the two corporations; the previous joint ventures of the corporations and their presidents was not sufficient to create an agency relationship.[212]

Once an agency relationship is found the facts must be examined to determine if the employee intended the payee to have no interest in the proceeds of the check. *Hobart Manufacturing Co. v. Fidelity & Deposit Co.*[213] illustrates the requirement of intent. An accountant, employed by the drawer, requisitioned checks purporting to be payable to the various creditors of the drawer. After preparation, the accountant submitted the checks to the drawer's treasurer for signing. Checks amounting to over $400,000 had been requisitioned by the accountant and signed by the treasurer before the accountant's fraudulent practices were detected. It was revealed that the accountant had designated as payees various individuals to whom he was indebted. These checks were delivered to the named payees who indorsed the checks and received payment. An action was brought by the drawer against its insurer on the drawer's forgery bond. It was held that since the checks were not payable to fictitious payees the drawer could not recover against its insurer.

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[210]UCC § 3-405, Comment 4.

[211]*See* Jerman v. Bank of America, 7 Cal. App. 3d 882, 87 Cal. Rptr. 88 (1970); Adelphia Factors, Inc. v. Bank of Old York Road, 83 Montg. Co. L.R.101 (Pa. 1963); 2 R. ANDERSON, UNIFORM COMMERCIAL CODE § 3-405: 11, at 936 (2d ed. 1971).

[212]Adelphia Factors, Inc. v. Bank of Old York Road, 83 Montg. Co. L.R.101 (Pa. 1963).

[213]360 F.2d 453 (6th Cir. 1966).

To determine whether the checks were payable to fictitious payees, the court examined the element of intent. Section 3-405 (1) (c) compels adherence to the intent of the employee. Since the employee intended the payees to have an interest in the proceeds and to receive possession of the checks, they were not payable to fictitious payees. This case should be contrasted to the situation in which the employee intended to divert the checks and forged the payee's indorsement. An unauthorized indorsement in the name of the payee will be effective.[214]

A dichotomy in judicial construction has arisen to ascertain when an employee or agent has supplied his employer or principal with the name of the purported fictitious payee intending the payee to have no interest in the proceeds.[215] When an employee has furnished his employer with the name of a payee who is a *bona fide* creditor of the employer, the check being drawn to pay for goods or services rendered to the employer, the employee has not supplied the name of the payee within the meaning of § 3-405 (1) (c).[216] On the other hand when an agent who supplies the name of a payee who is not a bona fide creditor and the purported obligation leading to the issuance of the check is fraudulent the doctrine is invoked.[217]

Most businesses, in order to protect against the infidelity of an employee, maintain intensive internal control and accounting procedures. Such procedures normally delegate the disbursements of checks over many departments to guard against fraudulent checks. These procedures will usually require the joint action of several employees to successfully

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[214]*See, e.g.,* May Dep't Stores Co. v. Pittsburg Nat'l Bank, 374 F.2d 109 (3d Cir. 1967).

[215]Snugg Harbour Realty Co. v. First Nat'l Bank, 105 N.J. Super. 572, 253 A.2d 581, *aff'd per curiam,* 253 A.2d 545 (1969). In this case the plaintiff construction company maintained a system whereby its creditors submitted invoices to the plantiff's superintendent. After the superintendent's investigation that the creditor's alleged work was completed or materials furnished, the superintendent initiated the invoices and forwarded them to the bookkeeper who prepared a check. Certain creditors authorized the superintendent to procure their checks for delivery to them. The superintendent failed to deliver some of the checks and after forging the payee's indorsements, cashed and converted the proceeds. It was held that § 3-405 (1) (c) had no application since the superintendent did not supply the name of the payees to his employer intending the payees to have no interest in the checks. The court's conclusion was based on the fact that the payees were *bona fide* creditors of the construction company. Consequently, the payor bank was held liable to its customer, the construction company, for the checks bearing the surreptitious indorsements.

[216]*Id.*

[217]*See, e.g.,* New Amsterdam Cas. Co. v. First Pennsylvania Banking & Trust Co., 451 F.2d 892 (3d Cir. 1971).

consummate a fraudulent check scheme. In one case[218] a single employee was able to effectuate a scheme culminating into his receipt of checks; the employee intended the named payees to have no interest in the proceeds. In pursuing an action against the payor bank, the employer contended that "supplied", as used in § 3-405 (1) (c), must be ascertained by determining the distance between the dishonest employee and the physical preparation of the checks. Since other departments perused the fictitious orders prepared by the employee and had to take some affirmative action, it was argued that the employee had not furnished the name of the payees but rather the drawer itself had supplied the names. Rejecting this argument and denying the drawer recovery, the court observed that "supplied" encompasses situations in which the employee starts the wheels of normal business procedures in motion to produce a check for a nonauthorized transaction.

> [W]e can find no viable place to draw the line within the business enterprise of the drawer. [T]he only rationale distinction lies between bona fide and fraudulent transactions because it is only in the case of a bona fide transaction that anyone other than a faithless employee may be said to have supplied the name of the payee to the company.[219]

V. Forged Signature Checks

A. Rights and Liabilities of Payor Banks

The Code does not alter the established rule that a payor bank finally paying a check bearing the unauthorized signature of the drawer must recredit its customer account for the amount of the item improperly charged.[220] It then becomes pertinent to ascertain if the payor bank may recover the amount of its mistaken payment from some prior party.

In the normal concatenation of circumstances the check has been presented to the payor bank by a collecting or intermediary bank. As noted in the discussion on forged indorsements, each collecting bank or other party makes certain warranties to the payor which run with the instrument.[221] However, with respect to the authenticity of the drawer's signature, the warranty is limited to the extent that the party obtaining payment has no *knowledge* that the signature is not genuine.[222] Conse-

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[218]New Amsterdam Cas. Co. v. First Pennsylvania Banking & Trust Co., 451 F.2d 892 (3d Cir. 1971).

[219]*Id.* at 898.

[220]*See* Jackson v. First Nat'l Bank, 55 Tenn. App. 545, 403 S.W.2d 109 (1966).

[221]UCC §§ 3-417 (1), 4-207 (1).

[222]UCC §§ 3-417 (1) (b), 4-207 (1) (b).

quently, a payor bank must bear the loss from its final payment to a party having no knowledge of the unauthorized signature.

The Code has codified the rule of *Price v. Neal* by specifying that payment of a check is final in favor of two classes: (1) holders in due course; and (2) one who has in good faith changed his position in reliance upon the payment.[223] This statute, however, is expressly subject to the warranty provisions of § 3-417. There may be cases in which a holder acquires a check in circumstances to permit him to be a holder in due course, yet knowledge is obtained of the forged signature before payment or acceptance. A holder in due course who collects a check before acceptance, knowing the signature of the drawer not to be genuine, has extended and breached a § 3-417 warranty and cannot rely on the finality of payment provision.[224]

The rule, placing the loss on payor banks, has been stated to rest on various theories. One is that a payor bank has access to an exemplar of its customer's signature from the signature card signed by the drawer authorizing payment pursuant to his orders. Collecting banks and other transferors do not have access to an exemplar. As between two innocent parties, the one in the best position to protect against the loss should shoulder the burden. In fact the payor has permitted the fraud to be consummated through its own inadvertence by failing to consult the signature card of its customer and the law charges the payor bank to know the signature of its depositors.[225] This reasoning is not viable in cases when a forged signature is so skillfully executed as not to be discernable to the most careful eye. Perhaps it may be justified on the ground that a holder in due course will have an equity superior to that of the payor bank.[226]

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[223]UCC § 3-419. The rule may be stated to be that:

> [A] bank of deposit is bound at its peril to know the signature of its depositors; and while an indorser of a check for presentment guarantees all prior indorsements, it does not warrant the genuineness of the maker's signature to the drawee bank. When a holder in due course presents a check to the drawee and it is accepted, the bank cannot thereafter recover the money from the person to whom it is paid or from any of the indorsers.

Citizens Bank v. National Bank of Commerce, 334 F.2d 257, 258 (10th Cir. 1964).

[224]UCC § 3-417, Comment 4; CLARKE, BAILEY AND YOUNG, *supra* note 5, at 136.

[225]*See* First Nat'l Bank v. Deposit Guar. Bank & Trust Co., 247 Miss. 765, 156 So. 2d 814 (1963); Railway Express Agency v. Bank of Philadelphia, 168 Miss. 279, 150 So. 525 (1933).

[226]*See* O'Malley, *Common Check Frauds, supra* note 2, at 202.

B. Defenses Available to Payor Banks

Having seen that the payor bank must normally absorb the loss precipitated by its final payment of a forged-signature check, there do exist provisions in the UCC which may insulate the payor from liability to its customer. These exculpatory provisions are found in part in § 4-406 relating to the duty of the customer to discover and report forgeries of his signature to the drawee bank.

A depositor is charged with the duty to exercise reasonable care and promptness in examining his bank statement and cancelled checks.[227] For failing to fulfill this duty, a customer is precluded, in certain situations, from demanding the payor bank to recredit his account for the improper payment. A preclusion arises if the payor bank affirmatively establishes that it suffered a loss, regardless of the amount, due to the customer's delay in reporting his forged signature on any check.[228] There will also be a preclusion if the customer fails to inform the payor bank within a reasonable time, not to exceed fourteen days, that a check has been paid which bears his forged signature and subsequent checks are paid which are drawn by the same forger. A reasonable time does not commence until the bank statement and cancelled checks, containing the initial forged item, have been made available to the customer.[229] If the payor bank is negligent in paying the items then the customer's delay in conveying notice will not bar assertion of the improper payment.[230]

To compel the prompt perusal of a customer's bank statement and the returned items supporting the debits, a controversial[231] time limit, in the nature of a hybrid statute of limitations, is imposed within which a drawer must report discrepancies to the payor bank as a prerequisite to instituting an action for the improper payment.[232] For forgeries of the

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[227]UCC § 4-406 (1).

[228]UCC § 4-406 (2) (a).

[229]UCC § 4-406 (2) (b); Lawrence Fashions Inc. v. National Bank, 8 UCC REP. SERV. 729 (N.Y. Sup. Ct. N.Y. County February 1, 1971); Gennone v. Peoples Nat'l Bank & Trust Co., 51 Pa. D. & C.2d 529, 9 UCC REP. SERV. 707 (Pa. C.P. January 21, 1971).

[230]UCC § 4-406 (3); Jackson v. First Nat'l Bank, 55 Tenn. App. 545, 403 S.W.2d 109 (1966); Exchange Bank & Trust Co. v. Kidwell Constr. Co., 463 S.W.2d 465 (Tex. Civ. App. 1971); W. P. Harlin Constr. Co. v. Continental Bank & Trust Co., 23 Utah 2d 422, 464 P.2d 585 (1970).

[231]*See* Murphy, *Uniformity, Forged Indorsements and Comprehension—Some Observations on the Uniform Commercial Code*, 35 MISS. L.J. 356 (1964).

[232]UCC § 4-406 (4); Allied Concord Financial Corp. v. Bank of America Nat'l Trust & Sav. Ass'n, 275 Cal. App. 2d 1, 80 Cal. Rptr. 622 (1969).

drawer's signature and other alterations appearing on the face or back of the instrument, notice must be conveyed within one year after the statement and cancelled checks have been made available to the customer.[233] A three year time limitation is prescribed for unauthorized indorsements.[234] The one and three year notice provisions are absolute and apply irrespective of the negligence of the drawee bank in paying the items.[235]

Thus, it may be said that provided that a payor bank has paid the checks in good faith, the Code mandates that a depositor discover and report irregularities promptly after the statement and returned items are made available.[236] Oral or written notice is sufficient.[237] If, however, the depositor fails to give notice to the drawer, his tardiness may be justified, upon proof sufficient to create a jury issue, and his right of recovery may not be foreclosed. Payment by the drawee must be in *good faith*; if not, the customer's right of action is not barred.[238] However, failure to give notice within the one year period, without regard to the negligence of the drawee or customer, is an absolute bar to the depositor's claim.[239]

An open question is said to exist under the UCC regarding the drawer's duty to inspect and report irregularities if the forger himself is an agent of the drawer and is entrusted with the task of examining the bank statements and cancelled checks.[240] In such cases the employee is able to manipulate his employer's records and the forgeries may go undetected for a substantial period of time. Should the knowledge of the agent be imputed to the principal? The test utilized in such circumstances has been found by alluding to prior law since the Code is silent.

Prior to the adoption of the UCC a majority of the courts, including Mississippi, held that a depositor was not charged with knowledge of the

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[233]UCC § 4-406 (4).

[234]*Id.*

[235]*See* Bank of Thomas County v. Dekle, 119 Ga. App. 753, 168 S.E.2d 834 (1969); Exchange Bank & Trust Co. v. Kidwell Constr. Co., 463 S.W.2d 465 (Tex. Civ. App. 1971).

[236]*See, e.g.,* Bank of Thomas County v. Dekle, 119 Ga. App. 753, 168 S.E.2d 834 (1969).

[237]Duralite Co. v. New Jersey Bank & Trust Co., 97 N.J. Super. 48, 234 A.2d 247 (1967).

[238]Bank of Thomas County v. Dekle, 119 Ga. App. 753, 168 S.E.2d 834 (1969).

[239]Davis Aircraft Prod. Co. v. Bankers Trust Co., 36 App. Div. 2d 705, 319 N.Y.S.2d 379 (1971); Billings v. East River Sav. Bank, 33 App. Div. 2d 997, 307 N.Y.S.2d 606 (1970); Stauffer v. Oakwood Deposit Bank, 19 Ohio App. 2d 68, 249 N.E.2d 848 (1969) (bank has burden of proving when notice was given).

[240]*See* CLARKE, BAILEY AND YOUNG, *supra* note 5, at 165.

forgery possessed by the agent so as to absolutely construct a barrier to recovery. Knowledge, however, is imputed to the principal of facts that an honest agent would acquire from an impartial examination.[241]

From the vantage point of the minority, the knowledge of the agent of the forgery itself is chargeable to the principal and the drawee bank is not liable for forgeries subsequently discovered.[242]

The majority rule was applied in *Exchange Bank & Trust Co. v. Kidwell Construction Co.*[243] The plaintiff had employed for many years a secretary in whom he had complete confidence and trust. Checks were forged by the secretary, payable to herself, for a period of three years before her peculations were discovered. An action was commenced against the drawee for the amount of the checks forged within a one year period prior to the plaintiff's notice; the other checks were barred by the one year notice period of § 4-406 (4).

The drawee claimed that it had paid the items in good faith. Therefore, due to the fourteen day limitation as well as drawer's failure to exercise reasonable care in detecting and reporting the forgeries by allowing a dishonest employee to examine the returned statements, the drawer was precluded from pursuing his claim. Finding that an honest agent entrusted with examining the returned items and bank statement would have unraveled the forgeries, there was a breach of the depositor's duty to use reasonable care in discovering and reporting the forgeries. However, if the customer establishes lack of ordinary care on the part of the drawee in paying the items, the bank cannot assert the breach of the depositor's duty to report forgeries as a defense. Since the jury found the bank negligent in paying the forged items, the plaintiff prevailed in his claim notwithstanding his own negligence.

One court has held, inferentially, that the depositor's duty to report forgeries is not applicable where the cancelled checks returned to the customer contain checks that do not purport to be drawn against the depositor's account. Section 4-406 was said to apply to forged or unauthorized signatures of the drawer or indorser on checks drawn upon the customer's account. However, the case was resolved on the basis that

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[241]*See* Deer Island Fish & Oyster Co. v. First Nat'l Bank, 166 Miss. 162, 146 So. 116 (1933); Exchange Bank & Trust Co. v. Kidwell Constr. Co., 463 S.W.2d 465 (Tex. Civ. App. 1971).

[242]Faber v. Edgewater Nat'l Bank, 101 N.J. Super. 354, 244 A.2d 339 (1968); Exchange Bank & Trust Co. v. Kidwell Constr. Co., 463 S.W.2d 465 (Tex. Civ. App. 1971).

[243]463 S.W.2d 465 (Tex. Civ. App. 1971).

due diligence of the depositor is not required when the bank is itself negligent in the first instance; the bank was negligent in charging items to its customer's account that were in fact drawn on other accounts.[244] When the drawee pays checks bearing the signature of one not authorized to draw on the account the drawee has been deemed negligent, excusing the delay of the customer's notification.[245]

It appears that the Code contemplates that the drawee bank must supply its customer with a bank statement and the cancelled checks supporting the debits before the time period may commence.[246] Yet in *Myrick v. National Savings & Trust Co.*,[247] the court held that a customer has a duty to inquire upon his failure to receive a bank statement and cancelled checks. In fact, the court held that the customer was negligent, as a matter of law, in not directing such inquiries. This negligence was held to preclude the customer under § 3-406 from demanding a credit from the drawee for its improper payments over the depositor's unauthorized signature. It has been submitted that the proper solution as to whether a customer should make such an inquiry should be resolved by the trier of fact and not by the court.[248]

C. Waiver or Defense

A drawee bank having a valid defense for delay in notification against its customer for an improper payment of a check may not waive

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[244]W. P. Harlin Constr. Co. v. Continental Bank & Trust Co., 23 Utah 2d 422, 464 P.2d 585 (1970).

[245]*Id.*

[246]Section 4-406 (1) provides:

> When a bank sends to its customer a statement of account accompanied by items paid in good faith in support of the debit entries or holds the statement and items pursuant to a request or instructions of its customer or otherwise in a reasonable manner makes the statement and items available to the customer, the customer must exercise reasonable care and promptness to examine the statement and items to discover his unauthorized signature or any alteration on an item and must notify the bank promptly after discovery thereof.

[247]268 A.2d 526 (D.C. Ct. App. 1970).

[248]7 UCC Rep. Serv. Editor's Note, 1139-1140.

A payor bank may, of course, assert the defenses of negligence in substantially contributing to the placement of the drawer's unauthorized signature on the check as well as estoppel and ratification. Wilmington Trust Co. v. Phoenix Steel Corp., 273 A.2d 266 (Del. 1970) (drawer "precluded" from asserting unauthorized signature); Wiest v. National Bank, 10 Lycoming R. 125 (Pa. C.P. 1966) (drawer ratified his unauthorized signature by retention of proceeds) discussed in Annot., 23 A.L.R.3d 932, 1006 (1969); Boulevard Check Cashing, Inc. v. Copen, 7 UCC Rep. Serv. 822 (N.Y. Civ. Ct. Queens County May 7, 1970).

this defense and seek reimbursement from a collecting bank or any other party.[249] Thus when a customer fails to give notice within the prescribed period or breaches his duty in tendering a prompt notification of irregularities in the checks a drawee recrediting the customer's account acts at its own peril.[250]

In the majority of situations a payor bank will not be entitled to seek reimbursement for its final payment of an item containing the drawer's forged signature. With respect to forged indorsements and material alterations the drawee will normally be permitted to collect its loss from the party obtaining payment on the basis of the warranties extended upon payment of the instrument. It is in these situations that the waiver of defenses by a payor bank against its customer will be significant.

The waiver contained in § 4-406 (5) expressly applies only to defenses arising under § 4-406. However it is feasible that a court could find that a payor bank can not waive other defenses, such as negligence, ratification or estoppel.[251] This could be obtained by resort to common law through § 1-103, the court regarding the Code as silent on the issue. A "no-waiver" rule could also be fashioned by analogy from § 4-406 (5).

VI. Double Forgeries

Complex problems and questions arise in situations where both the signature of the drawer and payee are unauthorized; these are classified as "double forgeries."[252] The drawer is interested in having the payor bank recredit his account. If the one year time period for notice has elapsed, may the drawer demand the payor bank to recredit his account on the basis of the forged indorsement? If a drawer conveys a prompt notification within the one year period, may the payor bank seek restitution from its transferor on the basis of the warranty of good title? Commentators have disagreed as to whether the Code mandates adherence to rules relating to forged indorsements[253] or forgery of the drawer's signature.[254]

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[249]UCC § 4-406 (5).

[250]*See* Commonwealth v. National Bank & Trust Co., 46 Pa. D. & C.2d 141, 6 UCC Rep. Serv. 369 (Pa. C.P. Dauphin County October 18, 1968).

[251]UCC § 4-406, Comment 5.

[252]*See* O'Malley, *Common Check Frauds, supra* note 2, at 244.

[253]Clarke, Bailey and Young, *supra* note 5, at 246; Note, *The Doctrine of Price v. Neal Under Articles Three and Four of the Uniform Commercial Code,* 23 Pitt. L. Rev. 198, 211 (1961); Comment, *Allocation of Losses from Check Forgeries Under the Law of Negotiable Instruments and the Uniform Commercial Code,* 62 Yale L.J. 417, 455-460 (1953).

[254]O'Malley, *Common Check Frauds, supra* note 1, 246-247 and n. 368.

Prior to the Code the majority rule was that principles relating to forged-signature checks applied. The minority rule analyzed the rights and liabilities of the parties as if the check were one containing only a forged indorsement.[255]

Those urging that the Code compels application of forged indorsement principles base their assertions on the warranty of title provisions.[256] Notwithstanding the forged signature of the drawer, the collecting bank and other transferors have, nevertheless, breached their warranty that it had good title to the check. It is said that the Code subordinates the forgery of the drawer's signature to the forgery of the indorsement.[257]

Opponents of this proposition contend that since the UCC sanctions an indorsement by one not intended to have an interest in the check,[258] the rules relating to forgery of the drawer's signature will apply.[259] This argument presupposes that in most double forgery situations, the one forging the drawer's signature will not intend the payee to have any interest therein, thus precipitating application of the nominal payee rules. However, it has been suggested that even in a case where the nominal payee rules do not apply the results would be the same.[260]

A double forgery case arising under the UCC was presented in *Bank of Thomas County v. Dekle*.[261] The drawer detected certain checks containing his forged signature as well as the unauthorized indorsements of the payees. Notice was conveyed to the drawee beyond the time period prescribed for reporting irregularities of the drawer's signature, but

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[255]CLARKE, BAILEY AND YOUNG, *supra* note 5, at 134; O'Malley, *Common Check Frauds, supra* note 2, at 244-45.

[256]UCC § 4-207 (1) (a); CLARKE, BAILEY AND YOUNG, *supra* note 5, at 135.

[257]BAILEY, BRADY ON BANK CHECKS § 15.16, at 508 nn. 252-253 (4th ed. 1969); Comment, *Allocation Of Losses From Check Forgeries Under The Law Of Negotiable Instruments And The Uniform Commercial Code,* 62 YALE L.J. 417, at 455 n. 192 (1953); Beutal, *Comparison of the Proposed Commercial Code, Article 3, and the Negotiable Instruments Law,* 30 NEB. L. REV. 531, 554-555 (1951).

[258]UCC § 3-405 (1).

[259]O'Malley, *Common Check Frauds, supra* note 2, at 246-247.

[260]*Id.* at 247 n. 368. The author's conclusion is premised with the fact that the UCC adopts the usual rules applicable to warranties. UCC § 3-417, Comment 1. To recover for a breach of warranty there must be a loss. The payor bank's loss resulted from paying the check over the drawer's forged signature rather than making payment to the wrong person due to the forged indorsement. Therefore, there is no loss which is "directly traceable" to the breach of warranty of title.

[261]119 Ga. App. 753, 168 S.E.2d 834 (1969).

within the period for reporting unauthorized indorsements.[262] Rejecting the bank's motion for summary judgment, the Georgia court held that even though the time period for reporting the forgery of the drawer's signature had elapsed, the notice of the forged indorsement was given within the statutory period, thereby entitling the drawer to assail a claim for the improper payment. Following this rationale, a drawer may elect to pursue either theory for recovery. It is interesting to note that the court did not mention the possibility of the unauthorized indorsement to be effective due to the fictitious payee provisions.

Analogizing from the underlying policies emanating from § 4-406, it is submitted that application of forged-signature check principles are contemplated in a situation analagous to *Bank of Thomas County v. Delke*. The apparent purpose of § 4-406 is to require a depositor to be prompt and diligent in espying forgeries and alterations. As to discrepancies in the drawer's signature and other alterations appearing on the check, the customer can recognize his own signature or consult his records to ascertain if the cancelled checks were, in fact, his genuine orders. As to unauthorized indorsements, the drawer does not have a readily comparable access to facts which would reveal the veritableness of the indorsement. Thus, § 4-406 permits a longer period of time within which forged indorsements may be reported.[263] In a double forgery case, a drawer may demand the payor bank to recredit his account upon seasonable notice to the drawee that his signature is unauthorized. When this one year period has expired, it would seem to go against the intent and purpose of § 4-406 to permit the drawee to protest the improper payment on the basis of the presence of a forged indorsement. By a prompt perusal of his bank statement and cancelled checks, the drawer could have unearthed the forgery of his signature in the first instance.

A Mississippi case involving a double forgery may be pertinent in predicting the outcome of this problem by our court. In an action between the drawee and collecting banks, the loss was placed upon the drawee since it was deemed to have been in the best position to protect against the mistaken payment. In holding that the forgery of the drawer's signature pervades the entire transaction, the court reflected upon policy

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[262]The Georgia version of the UCC provides that a customer must report forgeries of his signature within sixty days after the statement and cancelled items supporting the debits have been made available to the customer. Forged indorsements must be reported within one year. GA. CODE ANN. § 109A-4-406 (4) (Supp. 1971).

[263]*See* UCC § 4-406, Comment 5; Barden & Robeson Corp. v. Tompkins County Trust Co., 67 Misc. 2d 543, 324 N.Y.S.2d 543 (1971).

considerations stating that the final payment by the drawee must out of necessity effectively close the transaction.[264]

This case received considerable attention in *Mississippi Bank & Trust Co. v. County Supplies & Diesel Service, Inc.*,[265] being partially overruled. It was, however, made explicit that the payor bank is to bear the loss from the final payment of a check containing the drawer's forged signature.[266] Therefore, it appears that Mississippi will continue to apply rules relating to forged-signature checks in resolving the controversy.

VII. Conclusion

Basically, the rules of loss allocation in the UCC are comprised of simplicity and definiteness. For cases involving forged indorsements, the Code contemplates that the drawer or payee pursue an action against the payor bank who can, in turn, obtain restitution from the collecting bank. Yet the decisional law that has developed does admit exceptions based primarily on the avoidance of circuity of action. Payor banks are required to absorb the loss from checks bearing the drawer's unauthorized signature. These general rules also encompass certain defenses which a bank may utilize in appropriate cases to shield itself from liability.

In the future there will undoubtedly be check forgery cases containing complex and intricate factual situations. The twentieth-century forger is intelligent, elusive, and shrewd. When the factual background in these cases does not appear to be encompassed by the specific provisions of the Code, it is hoped that the courts will not subordinate the salutary policies of the UCC since they represent a uniform commercial policy.

Mississippi Bank & Trust Co. v. County Supplies & Diesel Service, Inc. represents the only Mississippi decision involving a check forgery to which the UCC was applicable. It is perhaps lamentable that the Code was only partially respected. Although the ultimate decision was sound under the Code, the means to the end were questionable since the lan-

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[264]First Nat'l Bank v. Deposit Guar. Bank & Trust Co., 247 Miss. 765, 156 So. 2d 814 (1963).

[265]*See supra* notes 41-42.

[266]The court reaffirms the proposition that it is the duty of a bank to know the signature of its depositors and that the payment of an instrument by a bank on a forged signature of one of its depositors effectually closes the transaction, except that if the bank can reach the person by whom the forgery was committed or one who receives the money with knowledge of the forgery. 253 So. 2d at 833 (Miss. 1971).

guage of the opinion was not couched within the proper provisions of the UCC. Such decisions create confusion and difficulty which were intended to be eliminated by the UCC. In addition, the case is not a healthy precedent for a future case containing a knotty fact situation. Hopefully, there will be complete adherence to the provisions of the Code in future forgery cases.

F. Gerald Burnett

PROBLEMS IN FACULTY DESEGREGATION

It seems ironic that problems for a black teacher arise when the school board establishes a unitary school system or instigates partial desegregation in accordance with a court order. The unnecessary duplication that existed under the dual school system may suddenly be eliminated in order to have an efficiently run system. A court faced with a teacher discharged because of this elimination of jobs, and often entire schools, is faced with two equally compelling claims. On the one hand, the school board contends that it must not only create an efficiently run system and maintain the highest quality of education that it possibly can, but it must also try to prevent "white flight" which would eventually reduce jobs and because of the corresponding increase of jobs in "private" schools, possibly drain the system of its best teachers.

On the other side is the black teacher, fostered by the dual system, who may be educationally inferior because of the prior lack of care exercised by the school board to provide a good education for black children. The school board thus may have hired teachers for black schools it would not have considered qualified for white schools. Even qualified teachers may have become unqualified simply due to frustration.[1] Once having given up and not utilized his skills for a period of time, he may have become inferior to other teachers who have utilized their skills. It is understandably difficult for such a teacher, having been "qualified" to teach in the system a considerable number of years, to understand why he should suddenly be unemployed. A person placed in such a situation may easily conclude that his discharge was racially motivated. This conclusion will probably be enhanced when he looks around and finds that the vast majority of teachers who have lost their jobs are black. He may see the job openings created by these discharges being filled by whites, a situation which only increases his belief that the school board was motivated by racism in discharging him. Once he has reached this conclusion, he is apt to bring suit. It is the purpose of this comment to discuss how the courts deal with these conflicting equities. Since a reduction in the student population and a corresponding reduction in teaching positions

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[1]A teacher in a lower grade is apt to become frustrated when he sees the children he taught the year before move up to the next grade and learn nothing. He might also become frustrated when he realizes that the teachers at the same grade level as his are simply not teaching. In these situations he is likely to wonder why he should put forth the effort to teach effectively.

cannot be avoided by the school board, discussion will be limited to those areas in which the board has control.[2]

I. School Closings

The closing of a school, particularly a previously all-black school, not only reduces the number of teachers, administrators, and staff required in the system[3] but may adversely affect those who remain, since they will have to be transferred[4] to a location which may at best be inconvenient. The closing of all-black schools also affects the previous pupils, since the burden of desegregation is placed on them.[5] Moreover, white students who continue to attend the same schools as before come to consider themselves as natives and, as a result, resent blacks as foreigners.[6] In spite of this, a school board may close a formerly all-black school, provided there are sufficient educational reasons to support the closing.[7]

In *Carr v. Montgomery County Board of Education*[8] the United States Court of Appeals for the Fifth Circuit upheld the closing of three formerly all-black schools due to either an inferior physical plant or site.[9] Other sufficient educational reasons have included the conversion of the formerly black schools into pupil development centers and vocational training centers.[10] *Mims v. Duval County School Board*[11] probably provides the most significant educational reasons for school closings. Five formerly all-black schools were closed in the ghetto section of East Jacksonville, Florida. One was "surrounded by an incinerator, a polluted creek and a poultry company creating a problem with regard to stench and sewage backing up in the school plant, producing noxious odors which even permeated the school cafeteria." It was "also located on a small site in a declining neighborhood. . . ."[12] The other schools were relatively new schools located in the midst of high crime areas. There

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[2]*See generally* Note, *The Negro Teacher in Desegregated Schools*, 42 N.Y.U.L. Rev. 916-919 (1967).

[3]Brice v. Landis, 314 F. Supp. 974 (N.D. Calif. 1969).

[4]Mills v. Birmingham Bd. of Educ., 449 F.2d 902 (5th Cir. 1971).

[5]Brice v. Landis, 314 F. Supp. 974 (N.D. Calif. 1969).

[6]*Id.*

[7]Bell v. West Point Mun. Sep. Sch. Dist., 446 F.2d 1362 (5th Cir. 1971).

[8]429 F.2d 382 (5th Cir. 1970).

[9]*Id.* It must be noted that the plan included the closing of some predominately all-white schools. Therefore, it could be anticipated that white students would be "in the minority in a formerly all-black school."

[10]Wright v. Board of Public Instruction, 431 F.2d 1200 (5th Cir. 1970).

[11]447 F.2d 1330 (5th Cir. 1971).

[12]*Id.* at 1332.

were incidences of vandalism and intrusion. This is the first case in which environmental considerations were held to be sufficient to close black schools. More importantly, the school board had trouble in maintaining a teaching staff. Since almost all black schools in large cities are located in ghetto areas with similar conditions, it appears that metropolitan areas could close black schools with virtual immunity, thus putting the burden of integration on blacks. It must be noted that there was no evidence of racial discrimination involving the closings.

When a black school is closed purely to avoid "white flight," the closing is considered to be racially motivated and therefore impermissible.[13] This is particularly true when the result is to create a burden on the entire school system as when the closing results in a "split session."[14]

The most difficult case a court must face is that in which there are valid educational reasons for closing the school, coupled with the school board's motivation to avoid "white flight." In *Gordon v. Jefferson Davis Parish School Board*[15] the school board admitted that, due to "white flight," they felt the only plan which would work was one which included the closing of a formerly all-black high school, which had been gutted by fire. The court upheld the decision to close the school, since it was patently inferior to the white high school. When the schools were somewhat equal, the Fifth Circuit reached a rather unusual conclusion. In *Lee v. Macon County Board of Education*[16] the school board argued the inferiority of the black school in the lower court, but the Fifth Circuit found that it was not inferior because it was in excellent condition. It must be noted, however, that the closing of the black school would have created an overpopulation of the white school.

When the apparent inferiority of the black school can be corrected by the expenditure of a minimal sum, the court has required that the school remain open.[17] When the school board has leased the formerly all-black school for other purposes, and the lessee has entered the premises or the board has contracted to increase the capacity of the white

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[13]Bell v. West Point Mun. Sep. Sch. Dist., 446 F.2d 1362 (5th Cir. 1971).

[14]*Id.*

[15]330 F. Supp. 1119 (W.D. La. 1971).

[16]448 F.2d 746 (5th Cir. 1971).

[17]Swann v. Charlotte-Mecklenburg Bd. of Educ., 328 F. Supp. 1346 (W.D. N.C. 1971) (where the reason for closing was that the school only had one entrance). However, the school board owned a second right-of-way which would only take the grading and surfacing or graveling of a short road to add a second entrance or exit for the school. *Id.*

school to allow an increase in the student population, the court has been reluctant to hold the school open.[18]

While it seems that the courts are making a case by case determination as to whether all black schools may be closed, it is submitted that the following rule may be applied. Schools may not be closed (1) to prevent "white flight" or for other racially motivated reasons, or (2) when a school is closed with one of the reasons being to avoid "white flight" and the other reasons, standing alone, would not constitute valid educational reasons.

Valid educational reasons do not exist when (1) both white and black schools are in good condition; (2) the white school is in better condition, but it would require the expenditure of money in order to prevent the white school from being overcrowded, and the black school is in good condition; (3) the black school is in poor condition but would require less money to bring it into good condition than would be required to allow the white school to handle the overpopulation of students; (4) the black school may be made adequate by the expenditure of a minimal amount. Valid educational reasons exist despite the above if the school is located in an area where the faculty and/or students may be in danger.

When, however, there is a contract for construction to add to the formerly all-white school to increase its population at the expense of a formerly all-black school, or when the formerly all-black school has been leased for pupil development centers or vocational training centers and there is no showing that these pupils are not already being adequately cared for at other locations or there is no urgent reason for moving them, the court should keep the formerly all-black school open, since if it does not meet the rules supplied above, the closing must be considered racially motivated. The school board has a duty of compliance with the constitutional mandate of desegregation.[19] Therefore, neither state law nor a state-created cause of action nor the fourteenth amendment's prohibition against depriving a person of property without due process should be allowed as a defense which will result in closing a black school which was closed initially because of racial motivation.

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[18]Brice v. Landis, 314 F. Supp. 974 (N.D. Cal. 1969). The court stated in *Brice* that no great harm would result from this decision because the lease had not been finally closed.

[19]Mills v. Birmingham Bd. of Educ., 449 F.2d 902 (5th Cir. 1971).

II. Transfers

In converting from a dual school system to a unitary system, the school board must assign principals, teachers, and teacher aides so that in no case will the racial composition of a staff indicate that a school is intended for black students or for white students.[20]

Although this appears to be an easy rule to follow, in reality court decisions enforcing faculty desegregation have been far from uniform and have not established a "faculty and staff ratio in each school 'substantially the same' as that for the entire district."[21] For instance, in *Clark v. Board of Education of Little Rock School District*,[22] the ratio was 29% black to 71% white. A plan in which the number of black teachers in each school would range from 15% minimum to 45% maximum was upheld, but in *Mannings v. Board of Public Instruction of Hillsborough County, Florida*,[23] where there were 18% black to 82% white, and where there were 90% white to 10% black in the white schools, and 50% white to 50% black in the black schools, this was held not to satisfy the constitutional requirement. It is submitted that the decision which best exemplifies the rule of law with regard to faculty integration is *Bradley v. School Board of the City of Richmond, Virginia*.[24] The court there held that the ratio of black to white must substantially be the same as the ratio of black to white in the system, and that a deviation of more than 5%, when caused by an imbalance of only one faculty member will not violate the rule of approximate parity. The court further took into consideration the different levels of instruction which require "distinct training and skills." Thus, providing these different levels and applying the standard ratio to each level has provided a true ratio which allows each school to be considered a school rather than considered as a wholly black or wholly white school.

Since the board must submit a plan which has real prospects of dismantling the dual school system at the earliest practical date,[25] it appears that a plan that calls for less will not suffice.

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[20]Singleton v. Jackson Mun. Sep. Sch. Dist., 419 F.2d 1211 (5th Cir. 1970).

[21]Davis v. Board of Sch. Comm'rs., 402 U.S. 33, 35 (1971).

[22]426 F.2d 1035 (8th Cir. 1970).

[23]427 F.2d 874 (5th Cir. 1970).

[24]325 F. Supp. 828 (E.D. Va. 1971).

[25]Green v. County Sch. Bd., 391 U.S. 430 (1968). One of the first remedial responsibilities of the school board is the elimination of invidious racial distinctions with regard to the policies and practices relating to faculty and staff. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

The transfer must be a real one and not merely a "Hobson's choice." In *Williams v. Kimbrough*[26] two teachers were offered a transfer to a one-room school sixty miles from town. The building was not in the best condition, and the facilities were not sufficient to provide for two teachers. Instead of accepting the transfer, the teachers "quit." The court held this was, in fact, a discharge. On the other hand, a teacher may not arbitrarily refuse to submit to a new assignment, nor may he rely on state tenure laws in refusing, unless the school board can comply with the constitutional requirement as well as the state tenure laws. This seems doubtful in light of the large number required to be transferred.[27] It appears that a transfer is unreasonable, and a teacher may refuse it, when the school board knows or should know of facts about the new position which would render acceptance of the transfer unlikely. When these teachers quit, they should be lumped with the teachers who are discharged. The distance to be traveled and the condition of the school are some of the factors to be taken into consideration. This rule has the added advantage of requiring the school board to make transfers in accordance with a detailed plan rather than merely by pulling teachers' names out of a hat.

III. Demotions and Discharges

A "[d]emotion . . . includes any re-assignment (1) under which the staff member receives less pay or has less responsibility than under the assignment he held previously, (2) which requires a lesser degree of skill than did the assignment he held previously, or (3) under which the staff member is asked to teach a subject or grade other than one for which he is certified or for which he has had substantial experience within a reasonably current period. In general and depending upon the subject matter involved, five years is such a reasonable period."[28]

When pursuant to a school desegregation order there will be a staff reduction which will result in the demotion or discharge of a teacher or principal, he "must be selected on the basis of objective and reasonable non-discriminatory standards."[29]

Teachers demoted or discharged form a pool from which the school board should draw when openings appear in their previous job classifications. The school board cannot fill the openings through recruitment

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[26]295 F. Supp. 578 (W.D. La. 1969).

[27]Mills v. Birmingham Bd. of Educ., 449 F.2d 902 (5th Cir. 1971). Mississippi does not have a teacher tenure law.

[28]Singleton v. Jackson Mun. Sep. Sch. Dist., 419 F.2d 1211, 1218 (5th Cir. 1970).

[29]*Id.*

of a teacher of a race, color, or national origin different from that of the teacher demoted or discharged until the one demoted or discharged who is qualified has had an opportunity to fill the opening and fails to accept.[30]

There is a per se presumption that the teacher demoted or discharged is qualified to fill the type of position from which he was demoted or discharged. In order to rebut this presumption, the school board "would have to establish . . . lack of 'qualification' by means of objective and absolute criteria, not by means of comparison with another applicant or by means of administrative institution. The board must show . . . the former principal to be independently unqualified to assume the new opening. And in order to fulfill that burden the board would have to establish quite clearly why one who was qualified prior to a desegregation order suddenly became unqualified after the order."[31] The school board then must establish that the teacher's objective qualifications diminished in an absolute sense after the issuance of the desegregation order and his demotion or discharge.[32] This is referred to as the *Singleton* mandate.

Singleton, however, is not retroactive, and if the demotion or discharge and subsequent opening occurred prior to *Singleton,* there is no per se presumption that the demoted or discharged teacher is qualified; but pre *Singleton* law does provide that "[w]here the educational processes had historically been segregated . . . the burden" of persuasion is cast onto the "school board to prove that its hiring practices are non-discriminatory."[33] Moreover, the Fifth Circuit recognized as early as 1966 that "the displaced personnel should, at the very minimum, be absorbed into vacancies appearing in the system."[34]

When the school board is under a present order to desegregate, it is important to note that *Singleton* does not require the faculty ratio to be frozen, but after faculty desegregation has been accomplished by invoking the system-wide ratio for each school, there may be changes from time to time "as a result of non-discriminatory application of objective merit standards in the selection and composition of faculty and staff."[35] However, before any reduction in the faculty or staff may take place, the school board must develop non-discriminatory objective criteria to be

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[30]*Id.*

[31]Lee v. Macon Co. Bd. of Educ., 453 F.2d 1104, 1110 (5th Cir. 1971).

[32]*Id.*

[33]*Id.* at 1113.

[34]United States v. Jefferson Co. Bd. of Educ., 372 F.2d 836, 893 (5th Cir. 1966).

[35]Carter v. West Felesiana Parish Schools, 432 F.2d 875, 879 (5th Cir. 1970).

used in selecting the faculty members who will be dismissed, and they must preserve the evaluation of the faculty member dismissed and make it available to him upon request.[36]

Even here, though, if the complaining teacher can show a long history of discrimination in the community and a failure of the school board to desegregate until forced to do so, coupled with a disproportionate number of discharges in the ranks of the black teachers, there is an inference that the discharges were racially motivated; the burden of proof is then shifted to the school board to show by clear and convincing evidence that the discharges were not racially motivated.[37] The fact that the discharged teacher may be inferior to others in a particular school is not sufficient. The school board is required to compare them with all other teachers in the system.[38]

There is one area of conflict which has not yet been litigated. That is the possibility of discriminatory reinstatement from the pool itself. This might result when there are members of both races within the pool. It is submitted that the school board should first look to objective non-discriminatory standards at the time the teachers are discharged. These standards should be on file with the school board. If the teachers are relatively equal, the school board should then turn to their present qualifications to determine if one has become unqualified since the discharge or if he has become more qualified (through additional schooling or by attending seminars) since his discharge. The latter requirements are harder to determine and therefore should appear clearly from the record. If the teachers are still relatively equal, the school board should look to seniority as the final determining factor. If the school board follows this procedure, there can be no charge of constitutionally impermissible motivation in rehiring.

IV. Remedies

When, contrary to the Singleton mandate a teacher has been discharged and the school board has not offered re-employment when there has been a subsequent opening, he is entitled to that position or a like position in the school system, and the fact that another has been hired to fill the opening does not "prevent appropriate relief by a court of equity in vindictation of the law and the Constitution."[39]

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[36]Singleton v. Jackson, Mun. Sep. Sch. Dist., 419 F.2d 1211, 1218 (5th Cir. 1970).

[37]Chambers v. Hendersonville City Bd. of Educ., 364 F.2d 189 (4th Cir. 1966); Baker v. Columbus Mun. Sep. Sch. Dist., 329 F. Supp. 706 (N.D. Miss. 1971).

[38]Williams v. Kimbrough, 295 F. Supp. 578 (W.D. La. 1969); Chambers v. Hendersonville City Bd. of Educ., 364 F.2d 189 (4th Cir. 1966).

[39]Lee v. Macon Co. Bd. of Educ., 453 F.2d 1104, 1112 (5th Cir. 1971).

When the teacher's discharge was racially motivated, the teacher must be given any available opening at that time. If there are no openings, the discharged teacher must be considered on a par with all other teachers now in the system. "If they are found to be superior to any, then they must be given such positions and the least qualified dismissed. If not, then they quite rightly may be refused acceptance in the system."[40]

If the teacher has found employment elsewhere, he is entitled to the difference between the two salaries plus moving expenses to his new position, and should he accept re-employment, he is entitled to reasonable expenses to move back.[41] If he is not employed elsewhere, he is entitled to back pay.[42]

The court may not deduct from this award compensation received from a second unrelated job which the teacher could have held even if he had not suffered illegal discrimination.[43] In any event, he is entitled to reimbursement of any retirement benefits he may have lost.[44] The court may also, at its discretion, award attorney's fees when the actions of the defendants were "unreasonable [and] obdurately obstinat[e],"[45] in a case alleging a firing as a result of the teacher's exercising his First Amendment rights or an action brought by the students.

The Action

The action for faculty desegregation need not be brought by the faculty. It is well settled that black pupils have standing to sue because (1) "racial allocation of the faculty denies them equality of educational opportunities without regard to segregation of pupils and . . . (2) removal of race considerations from faculty selection and allocation is, as a matter of law, an inseparable and indispensable command within the abolition of pupil desegregation."[46] The latter theory apparently allows students to challenge the discharge of teachers, although it also seems apparent that the discharged teacher will have to intervene before monetary damages could be ascertained and awarded.[47] The Equal Employ-

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[40]Williams v. Kimbrough, 295 F. Supp. 578, 586 (W.D. La. 1969).

[41]*Id.*

[42]Lee v. Macon Co. Bd. of Educ., 453 F.2d 1104, 1110 (5th Cir. 1971).

[43]Horton v. Lawrence Co. Bd. of Educ., 449 F.2d 793 (5th Cir. 1971).

[44]Williams v. Kimbrough, 295 F. Supp. 578 (W.D. La. 1969).

[45]*Id.* at 587.

[46]United States v. Jefferson Co. Bd. of Educ., 372 F.2d 836, 884 (5th Cir. 1966).

[47]The discharged teacher who has found employment elsewhere is entitled to the difference between his two salaries plus moving expenses to his new position. In order for the court to determine what his new salary is, if any, and his moving expenses, if any, the teacher would have to participate in order to get this information before the court. It is also submitted that as to this issue he is the only party of interest.

ment Opportunities Act of 1972 brings employees of educational institutions within the jurisdiction of Equal Employment Opportunities Commission.[48]

A. Procedure in the Absence of State Equal Employment Opportunities Law

When a teacher claims to be aggreived by an unlawful employment practice, he must file a charge with the Equal Employment Opportunities Commission within 180 days after the practice was committed.[49] The Commission must then notify the charged party within ten days. This notice must include the date, place, and circumstances of the alleged practice.[50]

The Commission will then investigate the charge to determine if there is reasonable cause to believe that it is true. If there is not reasonable cause to believe the charge true, the Commission will dismiss the complaint, but if there is reasonable cause to believe the charge is true, the Commission must try to reach a conciliation agreement with the charged party.[51] If the Commission has been unable to reach an acceptable agreement within thirty days after the complaint was filed, it will take no further action but will refer the case to the Attorney General who may bring a civil action, and the teacher has the right to intervene in this action.[52]

If the Commission has not filed a cause of action and the Commission has not entered into a conciliation agreement within 180 days, or if the charge was dismissed by the Commission, the Commission will notify the teacher, who may then bring suit within ninety days from the date of the notice.[53] It is important to note that in case the charge was dismissed before 180 days had elapsed, the teacher must wait until that time before commencing suit.[54]

When the complainant brings the cause of action, the court may appoint an attorney for him and may authorize the commencement of

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[48]The Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4 (Mar. 24, 1972).

[49]S. REP. No. 681, 92d Cong., 2d Sess. § 4 (e) (1972).

[50]S. REP. No. 681, 92d Cong., 2d Sess. § 4 (b) (1972).

[51]*Id.*

[52]S. REP. No. 681, 92d Cong., 2d Sess. § 4 (f) (1) (1972).

[53]*Id.* The court may permit the Attorney General to intervene.

[54]*Id.*

the action without the payment of fees, costs, or security.[55] The court may also stay the proceedings for not more than sixty days to allow further effort by the Commission to obtain voluntary compliance.[56]

After suit has been instituted by the Commission or the teacher, it is the duty of the chief judge in the district in which the cause of action is brought to designate immediately a judge to hear and determine the case.[57] It is the duty of the designated judge to assign the case for a hearing at the earliest practicable date and to cause the case to be in every way expedited.[58] If the designated judge has not scheduled the case for trial within 120 days after the issue has been joined, the judge may appoint a special master.[59]

B. Procedure With State Equal Employment Opportunities Law

When the state has an Equal Employment Opportunities law, no charge may be filed until sixty days after proceedings were commenced before the state enforcement body. This period is extended to 120 days during the state enforcement body's first year of existence.[60]

If the state enforcement body has a requirement for filing a complaint which is greater than the filing of a statement of facts signed by the complainant, the sixty day period will start to run from the time the teacher sends by registered mail a signed statement of facts.[61] The teacher then must file a charge with the Commission within 300 days after the alleged unlawful employment practice or within thirty days after receipt of notice that the local proceeding has been terminated, whichever is earlier.[62] After the charge is filed with the Commission, the procedure is identical to that discussed in Part A above, except that after a cause of action is filed, a district court may stay the proceedings for not more than sixty days pending the termination of the proceedings before the state enforcement body.[63]

If the teacher brings an individual action under Title VII of the Equal Employment Opportunities Act of 1964, alleging discrimination,

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[55] *Id.*

[56] *Id.*

[57] S. REP. No. 681, 92d Cong., 2d Sess. § 4 (f) (4) (1972).

[58] S. REP. No. 681, 92d Cong., 2d Sess. § 4 (f) (5) (1972).

[59] *Id.*

[60] S. REP. No. 681, 92d Cong., 2d Sess. § 4 (c) (1972). Mississippi does not have a local F.E.P.C.

[61] *Id.*

[62] S. REP. No. 681, 92d Cong., 2d Sess. § 4 (e) (1972).

[63] S. REP. No. 681, 92d Cong., 2d Sess. § 4 (f) (1) (1972).

or initiates an action alleging a firing in retaliation for exercising his first amendment rights, the action should be brought under the Civil Rights Act[64] as well as the fourteenth amendment. If brought under the latter, the teacher may be barred for failure to exhaust his administrative remedies[65] before the school board, but if brought under the Civil Rights Act, the teacher need not have pursued the board's administrative relief.[66] The school district is considered to be a person within the meaning of person in the Civil Rights Act and may be made a name defendant.[67] It must also be noted that a suit for back pay is not a claim for damages, but an "integral part of the equitable remedy for reinstatement" and, therefore, the defendant is not entitled to a trial by jury.[68]

V. Firing

Unlike discharges discussed previously, the firing of a teacher may not occur subject to a desegregation order and the position from which he was fired can be left open. The teacher generally challenges the firing as either an act of racial discrimination[69] or of retaliation for exercising his first amendment rights,[70] or both.[71]

A teacher alleging that "he has been dismissed for constitutionally impermissible reasons 'must bear the burden' of proof."[72] This burden is not shifted until he has established that he was dismissed for constitutionally impermissible reasons,[73] or there is an "absence of factual support for the stated reasons for the . . . [school board's] action tend[ing] to prove that some other constitutionally impermissible reason underlies the action."[74] Thus when a complaint has not charged the violation of substantive constitutional rights in the non-renewal of his contract, the courts will not inquire into the reasons for the state's action or the

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[64]42 U.S.C. § 1983 (1970).

[65]Bonner v. Texas City Ind. Sch. Dist., 305 F. Supp. 600 (S.D. Tex. 1969).

[66]McNeese v. Board of Educ., 373 U.S. 668 (1963). Right alleged is federal in origin and supplementary to any remedy the state might have. However, it must be noted that all this might change as a result of a bill which recently passed in the Senate which would bring employees of educational institutions under the protection of EEOC and allow EEOC to enforce its findings of job discrimination in the Federal Courts.

[67]Harkless v. Sweeney Ind. Sch. Dist., 427 F.2d 319 (5th Cir. 1970).

[68]*Id.*

[69]Glover v. Daniel, 434 F.2d 617 (5th Cir. 1970).

[70]Moore v. Winfield City Bd. of Educ., 452 F.2d 726 (5th Cir. 1971).

[71]Jennings v. Meridian Mun. Sep. Sch. Dist., 453 F.2d 413 (5th Cir. 1971).

[72]Fluker v. Alabama State Bd. of Educ., 441 F.2d 201, 205 (5th Cir. 1971).

[73]*Id.* at 206.

[74]*Id.* at 209.

adequacy or factual support for those reasons.[75] The teacher must allege that he has been fired for constitutionally impermissible grounds and upon trial prove that either he was fired because of this reason or that the school board had no factual basis for firing him, tending to prove the discharge was for constitutionally impermissible reasons.

There is some indication that if the teacher can show that the school board's action was even partially in retaliation for his assertion of a constitutional right, he can still recover,[76] but this appears to have been rejected in a more recent case.[77] In *Sindermann v. Perry*[78] the court set up an administrative procedure which should be followed prior to bringing an action. It recommends that the teacher should, upon receipt of notice that his contract will not be renewed, and wishing to assert that the non-renewal is punishment for the exercise of his constitutional rights, notify the school board with reasonable promptness of his claim in sufficient detail to enable the school board to show any error that may exist and request a hearing. Upon receipt of this notice, the school board should constitute a tribunal that possesses some academic expertise and has an apparent impartiality towards the charges to conduct a hearing. This hearing must include the right to bring witnesses and to confront and cross-examine the school board's witnesses.

The trial court should "stay its hands until the matter has been made ripe for adjudication by allowing such procedures to run."[79]

Although the court states that the "[p]rocess is best calculated to reach a fair accord and to settle the problems that have arisen between the parties,"[80] either party may refuse to follow it, or the positions of the parties may be such that the process would be a waste of time. In either case, the process is not a prerequisite to a trial. However, due process requires that a school teacher who has tenure or a reasonable expectation of re-employment, or who has no tenure or reasonable expectation of re-employment, but alleges he has been fired for constitutionally impermissible reasons, must be provided with notice and a hearing by the school board.[81] However, the teacher who brings his action under the Civil Rights Act need not have pursued his administrative remedies.[82]

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[75]*Id.*

[76]*Id.*

[77]Moore v. Winfield City Bd. of Educ., 452 F.2d 726 (5th Cir. 1971).

[78]430 F.2d 939 (5th Cir. 1970).

[79]*Id.* at 945.

[80]*Id.* at 944.

[81]Thaw v. Board of Public Inst., 432 F.2d 98 (5th Cir. 1970).

[82]McNeese v. Board of Educ., 373 U.S. 668 (1963).

When the teacher alleges that he was fired because he exercised his first amendment rights, a difficult case arises because the school officials are both public officials and the teachers' employers. As a teacher's employer, the school board may regulate the conduct of its employees in ways which are more restrictive than those which can be applied to citizens who are not employees.[83] With these factors in mind, the courts have tackled the problem of whether a public employee may be fired for exercising his right of free speech head on and reached the conclusion that "the answer has to be: maybe yes, maybe no."[84] The courts have attempted to balance the interests of the teacher in commenting on matters of public concern and the interest of the state as an employer in the orderly and efficient administration of education.[85]

When the employment is only tangentially and insubstantially involved in the subject matter of the communication made by the teacher, the teacher is considered a member of the public, and he may not be fired unless he has knowingly or recklessly made false statements resulting in harm.[86] A teacher's employment is generally not substantially involved when he makes statements which are not directed toward a person he normally comes in contact with in the course of his daily work,[87] since this is not likely to create a discipline problem or affect harmony of any of his co-workers not affected.[88] Thus, unless there is a material and substantial interference with the requirements of discipline, harmony or administration of the school, a teacher may not be fired for exercising his first amendment rights.

The most difficult case encountered in this area is *Glover v. Daniel*.[89] The plaintiff was a principal, forty-two years of age, with nineteen years in the system. The first instance of trouble occurred when a black principal left for a better position. A number of blacks were considered for his replacement, but a white was hired. When this was announced at the principals' meeting by the superintendent, the plaintiff strenuously objected, contending that a black should have been hired.[90] Thereafter the students from plaintiff's school boycotted to protest the hiring of the white principal. It does not appear whether all the black pupils

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[83]Glover v. Daniel, 434 F.2d 617 (5th Cir. 1970).

[84]Pred v. Board of Public Inst., 415 F.2d 851, 857 (5th Cir. 1969).

[85]Pickering v. Board of Educ., 391 U.S. 563 (1968).

[86]*Id.*

[87]*Id.*

[88]*Id.*

[89]318 F. Supp. 1070 (N.D. Ga. 1969), *aff'd*, 434 F.2d 617 (5th Cir. 1970).

[90]One witness testified that he had never seen a principal talk to the Superintendent in that manner. *Id.* at 1072.

in the system boycotted or whether the white principal was placed in a black school, although it seems that she was, since the board had just been placed under a desegregation order. The court found that the plaintiff either instigated or encouraged the boycott.

The second ground for firing was that there had been a number of burglaries in plaintiff's school. The sheriff thereafter discovered on a number of occasions that the school was left open at night and so informed the superintendent who, in turn, warned the plaintiff. Still the school was found to have been left open on a number of occasions. The court held that this reason standing alone would not be grounds for dismissal.

There was contradictory evidence as to whether the plaintiff had conducted fire drills in accordance with state law, but the court held that standing alone this would not be grounds for dismissal.

After the integration order had been issued, there were some desegregation meetings which the plaintiff was not required to attend but all other principals and his teachers attended. The court held that the plaintiff deliberately absented himself from these meetings.

It was thereafter decided that the system would go to a "non grade system"[91] pursuant to a plan to desegregate. In order to implement this system, it was necessary to give the pupils skill and achievement tests. When these tests were sent to the plaintiff's school, his students refused to take them. The plaintiff testified that he was against testing and felt that standardized tests were racially biased. The court found that either by his action or non-action he had sabotaged the test. It further found there was not a scintilla of evidence to support his suspicions that racial motives were involved in the testing.

There was one more ground for dismissal which the court held standing alone would not be sufficient for dismissal, but which did show the plaintiff's contentious attitude and suspicious nature. At a meeting to decide what text books would be utilized in the system, it was decided to utilize the same text books as before, evidently for economic reasons. The plaintiff demanded that they utilize multi-racial text books.

It can be readily seen that the plaintiff did interfere with the orderly administration of the school system. Moreover, the plaintiff was not able to introduce any proof that he had been fired for constitutionally

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[91]A "non grade system" is where the student is classified as to the number of years he has been in the system but attends class according to his ability. *Id.* at 1074.

impermissible reasons. The court held that the defendant was justified in firing him.

Taking the grounds for the firing one by one in plaintiff's favor, this is what they show: On his objection to the hiring of a white principal instead of a black one, it should be noted that there was a history of segregation in the school system as evidenced from the recent order to desegregate. On a trial the school board would have to show that its hiring practices were not discriminatory.[92] It must, therefore, be presumed that the hiring of the white principal was racially motivated. If the court can make a presumption, why couldn't the plaintiff? Once it is presumed that the school board's action was racially motivated and the superintendent could not justify his action,[93] why shouldn't plaintiff be allowed to exercise reasonable and peaceful means to correct the situation when his superiors refused to do anything about it? Since the failure to keep the school locked and failure to conduct fire drills standing alone would not justify his dismissal,[94] we proceed to his failure to attend the desegregation meetings. As he was not ordered to attend, this could hardly be grounds for dismissal, even coupled with the above grounds. This brings us to the final grounds, sabotaging the tests. Here again, there was a history of segregation in the community. The board was forced to desegregate, and in accordance with this plan gave a skill and achievement test. Coupled with this, are the facts recognized by the Fifth Circuit in *United States v. Jefferson County Board of Education*[95] that a "long continued policy of faculty segregation has resulted in inferior Negro teaching and in inferior education of Negroes as a class."[96] Achievement tests administered in such a situation are very likely to have an adverse effect on blacks taking them in comparison to whites,

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[92]*Id.* at 1071. The ratio between blacks and whites in the system was approximately 50-50. There were four principals - two black and two white. It would seem that each race had an elementary school and a high school. Thus when the white principal was hired, she no doubt took over a black school. The suit for desegregation was begun after the principal was hired.

[93]*Id.* at 1072. When the black principal left, he recommended two people as his successor. The defendant did not follow his recommendations but appointed the white principal who had been a teacher in the system and had previously had experience as a principal. It does not appear whether this fact was communicated to the plaintiff and even if it were, it does not indicate whether the hiring practices were discriminatory.

[94]*Id.* at 1075. The court states that the first amendment gives a teacher the right to speak his mind, but that it does not give him the right to disrupt a school or to choose its principals or to sabotage its programs.

[95]372 F.2d 836 (5th Cir. 1966).

[96]*Id.* at 892.

since they have been subjected to an inferior education. Moreover, less than six months after the district court decision, the Fifth Circuit held that testing would not be employed to assign students until a unitary school system had been established.[97] In *Leman v. Bossier Parish School Board,*[98] the Fifth Circuit stated: "[I]n *Singleton* we made it clear that regardless of the innate validity of testing, it could not be used until a school district had been established as a unitary system. We think at a minimum this means that the district in question must have for several years operated as a unitary system."[99] Since plaintiff's contract was not renewed for the 1968-69 school year, the year in which desegregation was to have begun, it is crystal clear the tests were given prior to the establishment of a unitary school system and therefore were invalid for use in desegregating the system.

Seen in this light, when it was apparent that the "administration" was racially motivated in hiring the white principal and was illegally administering the skill and achievement tests, plaintiff's actions are more acceptable.

In those cases prior to this case dealing with a teacher's first amendment rights, the disruption of the orderly and efficient administration of education had not been motivated by apparent discrimination on the part of the school board. Since one should not be required to be a part of the defendant's apparent illegal actions, these grounds for dismissal must fall. Once these grounds are dissolved, plaintiff's case tends to prove he was dismissed for constitutionally impermissible grounds, unless the school board could show that its hiring practices were non-discriminatory.

A much better rule would be to consider both the seriousness of the teacher's misconduct and the seriousness of the school board's misconduct in determining whether the teacher should be reinstated. To hold that the teacher's disruption of the orderly and efficient administration of education bars reinstatement ignores two important considerations: First, the school board's antecedent misconduct may have been so blatant that it provoked the teacher into misconduct, and second, reinstatement is the only sanction which prevents the school board from benefiting from its apparent racially motivated action.

In this case it appears that the apparently racially motivated action of the school board prompted plaintiff's action. It is also apparent that

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[97]Singleton v. Jackson Mun. Sep. Sch. Dist., 419 F.2d 1211 (5th Cir. 1970).
[98]444 F.2d 1400 (5th Cir. 1971).
[99]*Id.* at 1401.

he did not act alone but had the support of the parents of the children in his school who were equally outraged by the school board's action. To allow dismissal only causes a wider gap between the school board and the black community, and this gap will have to be bridged in order for any plan of desegregation to work.

If, on the other hand, the teacher's actions are not in response to the apparent misconduct of the school board, or reach the proportion of violence or the destruction of property, he should not be allowed to seek the protection of the first amendment.

CONCLUSION

When a school board is faced with the desegregation of its faculty, the rules that should be followed are relatively simple. The board should conduct a comprehensive review of its facilities to determine if any should be closed for sound educational reasons. The school board can then make plans for the transfers that will have to take place in order that the ratio of blacks to whites in one school approximate the ratio of blacks to whites in the entire system. It can also determine if some teachers will have to be demoted or discharged. If this will be required, the board should then develop non-discriminatory standards by which all the teachers in the system are to be rated. After the teachers have been rated, they should review them and determine who is to be demoted or discharged. If the teachers who are to be discharged are disproportionately black, the board should then review their standards to insure they are not discriminatory and with an eye toward proving it in court. They should then notify the teachers who will be demoted or discharged and offer them a hearing. If a cause of action is brought, the board should freely open its files to the plaintiffs and most importantly insure that all witnesses on their behalf testify. The board should realize that those discharged or demoted will have to be rehired when openings become available. If the board feels that these teachers are not qualified, it can protect itself by keeping them on salary under the condition they go back to school or attend seminars in order to become qualified. The discharged teacher would probably accept such an offer rather than face the uncertainties of unemployment. When such teachers return to the system, they will very likely bring with them new and better techniques of teaching and can be rotated back through the system, allowing others to be retrained in new techniques. By maintaining a constant pool of teachers, the educational process should never become static, as teachers would never become set in their ways, teaching in an outmoded manner. Also the best way to fight "white flight" is

through better education rather than discrimination. Once the dual system has been abolished and a unitary system has been established, the courts only require that the board deal with its teachers in a non-discriminatory manner.

The school board that fails to follow these rules is taking a costly risk. Court costs and back pay can amount to a considerable sum, and the teacher wrongfully discharged will have to be reinstated. If as much time, effort, and money were spent in making desegregation work as is spent in trying to avoid the inevitable, the educational system would be far better off.

The board could set up parental groups consisting of both black and white parents, preferably the leaders of each group, to attempt to adjust their differences, and, even more important, conduct student discussion groups. The board must realize that it is merely a "go between," and that it is responsible to both the black and white communities. The board is merely a means by which education is implemented, and its duty is to all children. The essence of the problem is that the board does not realize its role in the community but appears to place self-preservation above the public interest. By adhering to the law and realizing its true role, the public interest will be served, and desegregation will only be a minor problem.

James S. Macdonald

RECENT DECISIONS

CONFLICTS OF LAWS — INTRAFAMILY TORT — LAW OF FORUM APPLIES IN TORT ACTION INVOLVING FAMILY IMMUNITY DOCTRINE

A nonresident widow and her unemancipated daughter brought an action against the administrator of the estate of the deceased husband and parent and his insurance company for personal injuries sustained as a result of deceased's alleged negligence in operation of an automobile in which complainants were passengers.[1] The respondents moved to dismiss the action on the grounds that the Mississippi law prohibits civil suits in tort among members of a family[2] and that the Mississippi law is applicable in the present case. The complainants contended that Louisiana law should be administered by the Mississippi court, thus allowing a wife and daughter to sue the estate of the husband and parent and also allowing deceased's insurance company to be joined as a party defendant.[3] The chancery court adopted the respondents' position and entered a decree dismissing the action. On appeal to the Mississippi Supreme Court, *held*, affirmed. A Louisiana wife and unemancipated daughter cannot sue the husband and father for personal injuries caused by his negligent driving in a Mississippi court, and Louisiana's interests and procedural laws are not sufficient to overcome the settled policy and interests of the forum state. *McNeal v. Administrator of the Estate of McNeal,* 254 So. 2d 521 (Miss. 1971).

The weight of judicial authority upholds the family immunity doctrine in tort actions between husband and wife or parent and child, but

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[1]The logic behind complainants' decision to bring suit in Mississippi is unclear. By choosing to bring the suit in Mississippi, complainants thereby destroyed their right to maintain a cause of action. If they had brought the suit in Louisiana, their right of action would have been complete, at least against the insurance company, since Louisiana law permits a direct action against the insurance company. Complainants would also have had the advantage of being able to sue in the place of their domicile. The case itself gives no basis for the complainants' choice of forum.

[2]Mississippi still applies the family immunity doctrine in negligent or intentional tort actions between members of a family. This doctrine denies a cause of action between spouses and also between a parent and child.

[3]A Louisiana statute permits a party to bring a direct action against the insurance company of the insured. The statute provides:

> The injured person or his or her survivors or heirs hereinabove referred to, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy; and such action may be brought against the insurer alone, or against both the insured and insurer jointly and in solido, in the parish in which the accident or injury occurred or in the parish in which an action could be brought against either the insured or insurer.... LA. REV. STAT. § 22:655 (Supp. 1972).

an increasing number of courts are questioning the doctrine's validity.[4] The interspousal immunity doctrine is basically an offspring of the English common law,[5] but its origins can be traced to Biblical history, Roman law, and the natural law conceptions of the family as a unit.[6] The common law immunity was altered somewhat in 1844 when the Married Women's Acts were passed, establishing a separate legal identity for a married woman and thus destroying the concept that a husband and wife were one legal entity and allowing suits for certain causes of action.[7] As a result the courts have allowed tort actions involving property rights,[8] but less than half the courts which have considered the question permit personal tort actions between spouses.[9] The parent-child immunity for personal torts was never reported in the common law courts or courts of England, even though common law permitted property and contract suits; however, most authorities agree that there

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[4]*See generally* A. EHRENSWEIG, A TREATISE ON THE CONFLICT OF LAWS § 221 (1962); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 122 (4th ed. 1971) [hereinafter cited as PROSSER]; McCurdy, *Torts Between Persons in Domestic Relations,* 43 HARV. L. REV. 1030 (1930); Herskowitz, *Tort Liability Between Husband and Wife: The Interspousal Immunity Doctrine,* 21 U. MIAMI L. REV. 423 (1966); McCurdy, *Personal Injury Torts Between Spouses,* 4 VILL. L. REV. 303 (1959).

[5]At English common law neither spouse could sue the other in tort, since the husband and wife were considered one legal person. It therefore followed a person could not sue himself. *See* Abbott v. Abbott, 67 Me. 304, 24 Am. R. 27 (1877). In a later case the court indicated that at common law the husband and wife were regarded as one, the legal existence of the wife being merged in that of the husband during coverture. Thompson v. Thompson, 218 U.S. 611 (1910). This point was reiterated in a Mississippi case when the court said that a wife suing her husband "would be like the husband taking money out of one of his pockets and putting it back in another." Austin v. Austin, 136 Miss. 61, 62, 100 So. 591, 592 (1924).

[6]Damm v. Elyria Lodge No. 465, 158 Ohio St. 107, 107 N.E.2d 337 (1952). Here the court said:

> [T]he historical basis of these rules is a mixture of the Biblical and Medieval metaphysics, the position of the father of the family in Roman law, the natural-law concept of the family as an informal unit of government with the physically stronger person at the head, or the property law of feudalism. [*Id.,* 107 N.E.2d at 341].

[7]A typical statute is MISS. CODE ANN. § 452 (1956), which simply provides: "Husband and wife may sue each other."

[8]*See* McCurdy, *Property Torts Between Spouses and Use During Marriage of the Matrimonial Home Owned by the Other,* 2 VILL. L. REV. 447, 465 (1957); McCurdy, *supra* note 4, at 1037-1038; McCurdy, *supra* note 4, at 313.

[9]PROSSER, § 122 at 861-862; *see, e.g.,* Thompson v. Thompson, 218 U.S. 611 (1910); Ensminger v. Campbell, 242 Miss. 519, 134 So. 2d 728 (1961); Rubalcava v. Gisseman, 14 Utah 2d 344, 384 P.2d 389 (1963); Patusco v. Prince Macaroni, Inc., 50 N.J. 365, 235 A.2d 465 (1967); Monk v. Ramsey, 443 S.W.2d 653 (Tenn. 1969); Thomas v. Herron, 20 Ohio St. 2d 62, 253 N.E.2d 772 (1969).

was no rule to prevent such actions.[10] The immunity was first recognized in this country by a Mississippi court in *Hewellette v. George*,[11] when the court, without citing authority, dismissed a child's action for false imprisonment against her mother on the grounds of "sound public policy" and "the peace of the society." As was the case of the interspousal immunity, the courts have generally allowed actions between a parent and child in property matters, but very few have allowed actions for personal torts.[12] In application of both immunities, the courts have generally based their opinions upon several policy arguments. The most common is the fear that to allow such actions would disturb the peace and harmony of a family and impair parental discipline and control.[13] Various other reasons supporting the immunities have included adequacy of remedy in criminal and divorce laws, the danger of fraudulent claims, and a fear of trivial suits and a deluge of litigation.[14] Nevertheless, many exceptions have been developed to avoid the harsh consequences resulting from a strict application of the rule.[15] A movement toward complete abolition of the

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[10]PROSSER, § 122 at 865; McCurdy, *supra* note 4, at 1059-62. Sanford, *Personal Torts Within the Family*, 9 VAND. L. REV. 823, 832 (1956), indicates that various courts have concluded that the lack of cases implies that no cause of action was permitted, whereas others reason that the absence of cases shows there was no bar to a cause of action. In Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905), the court said there was a bar at common law; however, the Washington Supreme Court later repudiated the statement. Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1959).

[11]68 Miss. 703, 9 So. 885 (1891).

[12]*See, e.g.*, Maxey v. Sauls, 242 S.C. 247, 130 S.E.2d 570 (1963); Chaffin v. Chaffin, 239 Or. 374, 397 P.2d 771 (1964); Stevens v. Murphy, 69 Wash. 2d 939, 421 P.2d 668 (1966); Hill v. Graham, 424 P.2d 35 (Okla. 1967).

[13]A representation of the policy argument appearing in the many decisions dealing with the matter is given in Corren v. Corren, 47 So. 2d 774 (Fla. 1950). The court held that a wife could not sue her husband for injuries received from the negligent driving of their daughter, to whom he entrusted the car. The court said that "when one ponders the effect upon the marriage relationship were each spouse free to sue the other for every real or fancied wrong springing even from pique or inconsequential domestic squabbles, one can imagine what the havoc would be to the tranquility of the home." The court further said that "the success of the sacred institution of marriage must depend in large degree upon harmony between the spouses, and the relationship could easily be disrupted and the lives of the offspring blighted if bickerings blossomed into lawsuits. . . ." *Id.* at 776.

[14]*See* McCurdy, *supra* note 4, at 1050-54, 1072-77; Herskowitz, *supra* note 4, at 430-39.

[15]A decision which prompted an exception for intentional torts was Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905), in which the court denied a 15-year-old child a right to sue her father after he had brutally raped and beaten her. Other exceptions have allowed a suit when one of the parties has died, when a child has been hurt in the course of business rather than in personal activity, and in antenuptial torts. PROSSER, §122 at 863-64, 867. *See* Rayburn v. Moore, 241 So. 2d 675 (Miss. 1970), wherein the court held that the parental immunity doctrine does not apply when the plaintiff is a minor stepchild of the defendant who supported the

immunity began with Justice Harlan's dissenting opinion in *Thompson v. Thompson,*[16] and at present sixteen jurisdictions have construed the Marital Women's Acts to authorize an action for personal injuries between spouses.[17] Abrogation of the parent-child immunity has been slower in developing, probably because of the absence of any statute, such as the Married Women's Acts, which could be construed to permit a suit. Yet in 1963 Wisconsin took the lead in declaring that the parent-child immunity was abolished in that jurisdiction,[18] and subsequently eleven other jurisdictions have followed suit.[19]

In the instant case the court noted that both common law and the majority of state jurisdictions deny the right of intrafamilial suit in tort. The court cited *Austin v. Austin,*[20] in which the Mississippi Supreme Court adopted the interspousal immunity doctrine, and *Hewellette v. George,*[21] wherein Mississippi took the lead in establishing the parent-child immunity. The court reasoned that this immunity was necessary to preserve harmony and domestic accord in the family unit and to change the rule would require legislative action. Furthermore, since no

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plaintiff, but was under no legal obligation to do so, and the plaintiff was entitled to sue the defendant for the wrongful death of the plaintiff's mother in an automobile accident.

[16]218 U.S. 611 (1910).

[17]These jurisdictions include: Alabama, Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917); Arizona, Jaeger v. Jaeger, 262 Wis. 14, 53 N.W.2d 740 (1952) (stating the Arizona rule); Arkansas, Katzenberg v. Katzenberg, 183 Ark. 626, 37 S.W. 2d 696 (1931); Colorado, Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935); Connnecticut, Brown v. Brown, 88 Conn. 42, 89 A. 889 (1914); Kentucky, Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953); New Hampshire, Gilman v. Gilman, 78 N.H. 4, 95 A. 657 (1915); New York, Coster v. Coster, 289 N.Y. 438, 46 N.E.2d 509 (1943); North Carolina, Crowell v. Crowell, 180 N.C. 516, 105 S.E. 206 (1920); North Dakota, Fitzmaurice v. Fitzmaurice, 762 N.D. 191, 242 N.W. 526 (1932); Ohio, Damm v. Elyria Lodge No. 415, 158 Ohio St. 107, 107 N.E.2d 337 (1952); Oklahoma, Fiedeer v. Fiedeer, 42 Okla. 124, 140 P. 1022 (1914); South Dakota, Scotvold v. Scotvold, 68 S.D. 53, 298 N.W. 266 (1941); South Carolina, Prosser v. Prosser, 114 S.C. 45, 102 S. E. 787 (1920); Utah, Taylor v. Patten, 2 Utah 2d 404, 275 P.2d 696 (1954); Wisconsin, Wait v. Pierce, 191 Wis. 202, 209 N.W. 475 (1926).

[18]Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963). Followed in Ertl v. Ertl, 30 Wis. 2d 372, 141 N.W.2d 208 (1966).

[19]These jurisdictions include: Alaska, Hebel v. Hebel, 435 P.2d 8 (Alas. 1967); Arizona, Streenz v. Streenz, 106 Ariz. 86, 471 P.2d 282 (1970); California, Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971); Hawaii, Tamashiro v. DeGama, 51 Haw. 74, 450 P.2d 998 (1969); Illinois, Schenk v. Schenk, 100 Ill. App. 2d 199, 241 N.E.2d 12 (1968); Kentucky, Rigdon v. Rigdon, 465 S.W.2d 921 (Ky. 1971); Minnesota, Balts v. Balts, 273 Minn. 419, 142 N.W.2d 66 (1966); New Hampshire, Briere v. Briere, 107 N.H. 432, 224 A.2d 588 (1966); New Jersey, France v. A.P.A. Transport Corp., 56 N.J. 500, 267 A.2d 490 (1970); New York, Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969); North Dakota, Nuelle v. Wells, 154 N.W.2d 364 (N.D. 1967).

[20]136 Miss. 61, 100 So. 591 (1924).

[21]68 Miss. 703, 9 So. 885 (1891).

cause of action can be maintained against the husband and parent, no cause of action may exist against the husband and parent's estate,[22] despite the fact that his liability insurance covers a judgment against the decedent. The court therefore concluded that the wife and child had no right to maintain a civil suit in tort against the husband and father, if living, or his estate or insurance company, if deceased.

In the general area of torts and specifically intrafamilial torts, the courts have traditionally applied the law of the place of the wrong, *lex loci delicti,* in a conflict of laws question,[23] notwithstanding the fact that the courts have usually looked to the law of the domicile, *lex domicilii,* to resolve questions of family relations or status.[24] This rule has been traced[25] to *Dennick v. Railroad Company,*[26] which applied the theory developed by Joseph Beale that the rights and duties "vested" in the parties at the time of the tort and followed them wherever they might go.[27] This rule was characterized in the Alabama case of *Dawson v.*

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[22]The court based this conclusion on the earlier Mississippi decision of Ensminger v. Campbell, 242 Miss. 519, 134 So. 2d 728 (1961), which denied a wife's action against her deceased husband's estate. The court also quoted from the case of Lasecki v. Kabara, 235 Wis. 645, 294 N.W. 33, 35 (1940), in which the Wisconsin Supreme Court said:

> [I]t is, to say the least, shocking to our concept of justice that an unemancipated child, who has no cause of action against his living parent, may, if the parent die, and contingent upon such event, have a cause of action against the parent's estate or his administrator. . . . To deny an unemancipated child the right to sue his living parent for the latter's negligence and to grant him the right to maintain such an action against the parent's estate or his administrator, in case the parent dies, should not, in our opinion, be permitted, in the absence of a statute authorizing such action. Practically all of the courts of this country hold that the fact that the parent is insured, does not give rise to a cause of action based on the parent's negligence where no cause of action exists against the parent if not insured. [*Id.,* 294 N.W. at 35].

[23]"If a cause of action in tort is created at the place of the wrong, a cause of action will be recognized in other states. If no cause of action is created at the place of the wrong, no recovery in tort can be had in any other state." RESTATEMENT OF CONFLICTS OF LAWS §384 (1934); *see, e.g.,* Shaw v. Lee, 258 N.C. 609, 129 S.E.2d 288 (1963).

[24]*E.g.,* Lamar v. Micou, 112 U.S. 452 (1884); *In re* Lund's Estate, 26 Cal. 2d 472, 159 P.2d 643 (1945); Moore v. Saxton, 90 Conn. 164, 96 A. 960 (1916); Shick v. Howe, 137 Iowa 249, 114 N.W. 916 (1908); *In re* Troemper's Estate, 160 Kan. 464, 163 P.2d 379 (1945); Gray v. Holmes, 57 Kan. 217, 45 P. 596 (1896); *In re* Youmans', 218 Minn. 172, 15 N.W.2d 537 (1944).

[25]Comment, *The Second Conflicts Restatement of Torts: A Caveat,* 51 CALIF. L. REV. 762, 763-64 (1963).

[26]103 U.S. 11 (1880).

[27]*See, e.g.,* Slater v. Mexican Nat'l R.R., 194 U.S. 120 (1904); Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918); Bain v. Northern Pac. Ry., 120 Wis. 412, 98 N.W. 241 (1940); G. STUMBERG, PRINCIPLES OF CONFLICTS OF LAWS (3d ed. 1963).

Dawson,[28] wherein the court looked to the *lex loci delicti* in denying a wife's cause of action against her husband. In most American jurisdictions the courts have held that the rule of *lex loci delicti* shall apply regardless of the law of the forum.[29] The first case to depart from the traditional rule was *Emery v. Emery,*[30] in which the court separated the family immunity problem from the tort issue and applied the law of the parties' domicile. A leading case advocating the domicile rule was *Haumschild v. Continental Casualty Co.*[31] The court held that the capacity to sue, from the point of view of both logic and public policy, was more properly governed by the principles of family law, in which the law of the domicile usually prevails. The basic reason for this movement away from a strict application of the *lex loci delicti* is that the place of the injury has no relevant interest in the particular issues and parties of the suit, and the state of the family's domicile possesses the primary responsibility of governing the family's interest.[32] The movement is continuing, and though the courts have refused to strictly apply the law of the parties' domicile, the majority have generally agreed that the forum must make a subjective analysis of all the facts and interests involved. Such an analysis is necessary to determine what law is more appropriate to govern the parties' rights and liabilities in intrafamily tort issues.[33] In 1968 the Mississippi Supreme Court in *Mitchell v. Craft*[34] articulated and applied some basic factors and interests to be considered in this analysis.[35] These include the following: (1) The pre-

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[28]224 Ala. 13, 138 So. 414 (1931).

[29] STUMBERG, *supra* note 27, at 181-82.

[30]45 Cal. 2d 421, 289 P.2d 218 (1955). The court reasoned that the family immunity problem, being especially concerned with the family relationship, was more properly determined by the law of the state of the family domicile. However, this case was only a partial departure from the original rule, since the court indicated in its opinion that the law of the place of the wrong controlled in determining the existence of the tort cause of action.

[31]7 Wis. 2d 130, 95 N.W.2d 814 (1959). The *Haumschild* decision is prototypal of the modern trend in conflicts in both tort and immunity issues. This trend is is also reflected in the SECOND RESTATEMENT OF CONFLICTS OF LAWS which provides that the controlling law is that of the state having the most significant relationship with the occurence of the parties and with the parties, and later stating that whether one member of a family is immune from tort liability to another member of the family is determined by the local law of the state of their domicile. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 145, 169 (1969).

[32]Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955).

[33]*See, e.g.,* W. COOK, LOGICAL AND LEGAL BASES OF CONFLICT OF LAWS 248-51 (1942); EHRENSWEIG, *supra* note 4, at § 221; Ford, *Interspousal Liability for Automobile Accidents in the Conflict of Laws,* 15 U. PITT. L. REV. 397, 423-26 (1954); Hancock, *The Rise and Fall of Buckeye v. Buckeye,* 1931-1959; *Marital Immunity for Torts in Conflicts of Laws,* 29 U. CHI. L. REV. 237, 269-74 (1962).

[34]211 So. 2d 509 (Miss. 1968).

[35]*Accord,* Dorion v. Dorion, 241 A.2d 372 (N.H. 1968); *See* Leflar, *Choice-Influencing Considerations in Conflicts Law,* 41 N.Y.U.L. REV. 267, 282 (1966).

dictability of the results; (2) the maintenance of interstate order; (3) the simplification of the judicial task; (4) the advancement of the forum's interests; and (5) the court's preference as to what it regards as the somber rule of law. At present sixteen jurisdictions have modified the rule for a strict application of the law of the place of the tort,[36] and the trend is shifting toward a complete abrogation of the rule.

In the instant case the court made no reference to the "center of gravity" rule on which the appellant relied,[37] but it did analyze to some extent the interests of the parties and forum and applied two basic premises in upholding the forum interests over those of the parties. The court stated that foreign law will not be given effect when it is contrary to the settled policy of the forum, and that Mississippi's well-settled policy against intrafamilial suits in tort will prevail over Louisiana's law to the contrary.[38] The court further reasoned that since the *lex fori* prevails in laws which are remedial in nature, Mississippi law will control over the procedural Louisiana law.[39] The court therefore concluded

[36]These jurisdictions include: Indiana, Watts v. Pioneer Corn Co., 342 F.2d 617 (7th Cir. 1965); Alaska, Armstrong v. Armstrong, 441 P.2d 699 (Alas. 1968); Arizona, Schwartz v. Schwartz, 103 Ariz. 562, 447 P.2d 254 (1968); California, Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); District of Columbia, Myers v. Gaither, 232 A.2d 577 (D.C. Cir. 1967); Iowa, Fabricius v. Horgen, 257 Iowa 268, 132 N.W.2d 410 (1965); Kentucky, Wessling v. Paris, 417 S.W.2d 259 (Ky. 1967); Minnesota, Balts v. Balts, 273 Minn. 419, 142 N.W.2d 66 (1966); Mississippi, Mitchell v. Craft, 211 So. 2d 509 (Miss. 1968); New Hampshire, Johnson v. Johnson, 107 N.H. 30, 216 A.2d 781 (1966); New Jersey, Mellk v. Sarahson, 49 N.J. 226, 229 A.2d 625 (1967); New York, Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (Ct. of App. 1963); Oregon, Casey v. Manson Construction and Engineering Co., 247 Or. 274, 428 P.2d 898 (1967); Pennsylvania, Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964); Rhode Island, Woodward v. Stewart, 243 A.2d 917 (R.I. 1968); Wisconsin, Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965).

[37]Mitchell v. Craft, 211 So. 2d 509 (Miss. 1968). This case involved a choice-of-law problem in an action for wrongful death resulting from an auto accident in Louisiana, in which plaintiff's and defendant's decedents were killed. Both were domiciled in Mississippi, and their estates were being administered there. The court in its opinion modified the previously existing rule of Mississippi, in which the *lex loci delicti* was strictly applied, and it held that Mississippi law was applicable in light of the substantial relationships of the parties and the dominant interests of the forum. The court further said this holding was only a modification and not an overruling of earlier cases applying the *lex loci delicti*.

[38]Since Louisiana's family immunity is personal and remedial in nature, there may be suits directly against the deceased spouse's insurer or against his estate. These suits are allowed, since the Louisiana courts recognize a cause of action between spouses, though they fail to recognize a right of action. This denial of a right of action has been defined as merely procedural and personal in nature and doesn't apply to anyone outside the family, including the insurer. This right to sue an insurer is specifically allowed in LA. REV. STAT. §22:655 (1959).

[39]The question in the instant case is whether the Louisiana Direct Action Statute, LA. REV. STAT. §22:655 (1959), is procedural or substantive in nature. The

that the interests of the forum state are such that the forum law should be applied.

Society has a definite interest in preserving the basic family unit from fear of liability from personal injury resulting from the intimacy of daily living. Society also has an interest in providing a right to compensation to persons injured by another's negligent or intentional acts.[40] Where these policies conflict, the Mississippi courts have upheld the interests of the family by denying intrafamilial tort actions.[41] The instant case is the most recent addition to the chain of Mississippi cases which hold to this immunity in order to preserve domestic harmony;[42] however, the logic of the court's traditional position must be questioned in light of the modern trend of other courts' decisions. The mere presence of a tort action suggests that the peace and harmony of the family has been disrupted, and the denial of a tort action will not restore or preserve a peace which is not there. Discord does not lie in the court proceeding, but in the wrong which caused it.[43] In a suit against the estate of a spouse or parent, there is little logic to the argument that harmony will be destroyed. With the death of the party spouse there is no longer any domestic harmony to be protected.[44] The courts have cogently observed

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Mississippi courts first construed this statute as being more than a procedural right and therefore enforceable in this state. Burkett v. Globe Indem. Co., 182 Miss. 423, 181 So. 316 (1938). But in McArthur v. Maryland Cas. Co., 184 Miss. 663, 186 So. 305 (1939), the court said even though the forum has the right to decide whether a foreign law is procedural or substantive, the settled policy in Mississippi is to follow the construction given by the courts of the state which enacted it. In this case the Louisiana courts had construed the direct action statute as procedural, and the Mississippi courts followed. Chief Justice Smith went into a lengthy dissenting opinion denouncing the court's decision and saying that when a right of action is allowed or denied, there is a substantive question, not one of mere procedure.

[40]21 VAND. L. REV. 595, 599 (1968).

[41]Ensminger v. Campbell, 242 Miss. 519, 134 So. 2d 728 (1961); Tobias v. Tobias, 225 Miss. 392, 83 So. 2d 638 (1955); Ensminger v. Ensminger, 222 Miss. 799, 77 So. 2d 308 (1955); Deposit Guaranty Bank & Trust Co. v. Nelson, 212 Miss. 464, 54 So. 2d 476 (1951); Scales v. Scales, 168 Miss. 439, 151 So. 551 (1934); McLaurin v. McLaurin Furniture Co., 166 Miss. 180, 146 So. 877 (1933); Austen v. Austen, 136 Miss. 61, 100 So. 591 (1924).

[42]Cases cited note 42 *supra.*

[43]*See* Herskowitz, *supra* note 4, at 431-33; 35 MISS. L. J. 308, 309 (1964).

[44]Long v. Landy, 35 N.J. 44, 171 A.2d 1 (1961). *See also,* Welch v. Davis, 410 Ill. 130, 101 N.E.2d 547 (1951), the husband shot himself and his wife and left a minor daughter. The court, allowing the administrator of the wife's estate to maintain an action against the husband's executor stated:

> Today the immunity can be based solely upon the ground that domestic tranquility is fostered by the prohibition of actions by a wife against her husband. An immunity based upon the preservation of matrimonial harmony can have no pertinence in this case, for here the marriage has been terminated, husband and wife are both dead, and action is brought for the benefit of a third person. [*Id.,* 101 N.E. 2d at 549].

that in reality a modern lawsuit of this nature is not against a member of a family but is against an insurance company. Because of the insurance, there is no problem of marital discord or financial harm, and therefore no actual threat to the peace and harmony of the home exists.[45] This question of intrafamilial immunity becomes further complicated in a conflict of laws situation, as in the instant case. In this case the court wisely did not apply the *lex loci delicti* as required by the traditional rule of torts, but analyzed the interests of the forum and the parties involved to determine the applicable law. This analysis followed *Mitchell v. Craft,*[46] wherein the court modified the traditional rule of *lex loci delicti* and considered the various interests of the parties and forum to see which law was appropriate. The court's conclusion that the forum interests were predominant over those of the domicile of the parties is in keeping with *Mitchell v. Craft,*[47] which upheld another state law in light of the forum's interests. But this conclusion is one which should be examined. Many legal writers and courts have argued very persuasively that in a conflict of law question involving an intrafamilial tort, the domicile is more important in determining whether the suit should be permitted. It is contended that the domicile state has the responsibility for establishing and regulating the incidents of the family relationship. Furthermore, it is the only state in which the parties can, by participation in the legislative process, effect a change in those incidents. It is undesirable that rights, disabilities, and immunities conferred or imposed by family relationships should constantly change as members of a family cross state boundaries during temporary absences.[48] In the only reported cases which have had a similar fact situation, the law of the domicile has been applied.[49] The issues and their accompanying rules in the instant case are undergoing a reexamination by many courts throughout the country in light of the new arguments presented. This examination is wise and should be undertaken by this and every other court, lest they overlook some important and substantive points which should be given proper consideration.

George Fair

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[45]Brown v. Brown, 88 Conn. 42, 89 A. 889 (1914) (action by wife for assault and battery and false imprisonment); Lorang v. Hays, 69 Idaho 440, 209 P.2d 733 (1949) (wife seeking damages for false arrest and false imprisonment); Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953) (automobile accident).

[46]211 So. 2d 509 (Miss. 1968).

[47]*Id.*

[48]*E.g.* Emory v. Emory, 45 Cal. 2d 421, 289 P.2d 218 (1955). *See* COOK, *supra* note 33, at 248-51; EHRENSWEIG, *supra* note 4, at § 221. *See generally* Ford, *supra* note 33, at 397; Hancock, *supra* note 33, at 237.

[49]Johnson v. Johnson, 107 N.H. 30, 216 A.2d 781 (1966); Schwartz v. Schwartz, 103 Ariz. 562, 447 P.2d 254 (1968).

CRIMINAL LAW — ADMISSIBILITY OF VOICEPRINTS — VOICEPRINTS ARE ADMISSIBLE TO CORROBORATE AURAL VOICE IDENTIFICATION

Petitioner, charged with murder in the first degree, appealed from a state district court order discharging her application for a writ of habeas corpus based on an allegedly insufficient showing of probable cause for the issuance of arrest and search warrants. The showing of probable cause consisted of an aural voice identification of appellant's voice,[1] corroborated by a voice identification by voiceprint comparisons,[2] as the voice of an unknown telephone caller who had lured a police officer to his death.[3] On appeal to the Supreme Court of Minnesota, *held,* affirmed. Voiceprints, or spectrograms, are sufficiently accepted as reliable to be admissible to corroborate aural voice identifications if the expertise of the witness preparing and comparing the spectrograms is established. *State ex. rel. Trimble v. Hedman,* ..... Minn. ....., 192 N.W. 2d 432 (1971).

Prior to this decision appellate courts, while rejecting claims that the compulsion of an accused to give a tape recording of his voice for use in making a voiceprint is a violation of the self-incrimination privilege,[4] have refused to admit the identifications on various relevancy grounds.[5]

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[1]Identification testimony based on the sound of a person's voice is direct evidence of identity and therefore admissible. *See, e.g.,* Hurst v. State, 240 So. 2d 273 (Miss. 1970).

[2]The voiceprint, which is produced by a spectrograph, is a visual record of speech. This record has been used to identify unknown speakers through voiceprint comparisons of certain characteristics in the voices of known speakers with the same characteristics in the voice of the unidentified speaker. The identifications so obtained are allegedly highly accurate and not subject to error from attempts to disguise the voice. For a full discussion of the voiceprint technique see 19 AM. JUR. PROOF OF FACTS *Spectrogram Voice Identification* 423 (1967); L. Kersta, *Speaker Recognition and Identification by Voiceprints,* 40 CONN. B.J. 586 (1966).

[3]After approval by the district judge, a tape recording of petitioner's voice was obtained surreptitiously while she was discussing eligibility factors for her A.F.D.C. payments with a police officer disguised as an employee at the welfare office. This recording was used to prepare a voiceprint of defendant's voice for comparison purposes.

[4]The courts have held that the sound of a voice, the characteristic upon which the voiceprint depends, is a physical characteristic outside the protection of the privilege. *See, e.g.,* People v. King, 266 Cal. App. 2d 437, 72 Cal. Rptr. 478 (1968); *accord* State v. Cary, 49 N.J. 343, 230 A.2d 384 (1967); State v. McKenna, 94 N.J. Super. 71, 226 A.2d 757 (Essex Co. Ct. 1967).

[5]The function of relevancy in these cases is to assure the trustworthiness of the evidence. J. WIGMORE, THE SCIENCE OF JUDICIAL PROOF §220 (3d ed. 1937).

Nevertheless, a military court found the voiceprint admissible on the ground that neither infallibility of result nor unanimity of scientific opinion was required for admission. United States v. Wright, 17 U.S.C.M.A. 183, 37 C.M.R. 447 (1967). The military court differed in approach from other early cases in its willingness

When evidence sought to be introduced is an expert opinion founded on results obtained with a scientific device, the relevancy question is whether the particular device is generally accepted[6] as dependable for the proposed use by the profession concerned.[7] The early rejections of spectrogram identification grew out of a refusal of the courts to judicially notice[8] the voiceprint as scientifically accepted for use in voice identification, coupled with a failure of the prosecution to prove general scientific acceptance.[9] Evidence introduced to this end in the earlier cases overwhelmingly showed a lack of scientific acceptance of the device. Once a sufficient showing of scientific acceptance has been made, or judicial notice is taken thereof, the prosecution must demonstrate that the device used was in good condition and that the witness was qualified

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to accept the claims of a *single scientist* that the voiceprint is reliable in the face of contrary evidence when other evidence tends to show a lack of scientific acceptance, such an approach can easily lead to the admission of unreliable scientific evidence.

In an unreported portion of *People v. Straele,* a New York trial judge held that the question of scientific acceptance of the voiceprint was for the jury, who should determine the accuracy of the device and ultimately the weight of the evidence. Note, *Voiceprint Method of Identification—Reluctance of the Courts Toward Acceptance of Scientific Evidence,* 12 N.Y.L.F. 501, 510. While statistical accuracy is a credibility question, the jury are not qualified to determine the question of general scientific acceptance, which is a question of admissibility for the court.

[6]C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 171 (1954). The handling of the problem of scientific acceptance by some courts in requiring virtually unanimous scientific acceptance of a device as a prerequisite to admissibility has been criticized as more pertinent in cases in which judicial notice of scientific acceptance is requested. *Id.* There are cases holding that general scientific acceptance does not require unanimous acceptance of a technique and the lack of such acceptance goes to the weight of the evidence. *See, e.g.,* McKay v. State, 155 Tex. Crim. App. 416, 235 S.W.2d 173 (1950). An example of the former approach is Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

[7]J. WIGMORE, *supra* note 5.

[8]Judicial notice, a substitute for evidence, is only proper for matters of common knowledge and for facts capable of such certain verification as to be indisputable among reasonable men. C. McCORMICK, *supra* note 6, §§ 324-325. When the voiceprint reaches the point at which scientific acceptance is not subject to reasonable dispute, judicial notice of the technique's general scientific acceptance may be taken, obviating the necessity of formal proof.

[9]People v. King, 226 Cal. App. 2d 437, 72 Cal. Rptr. 478 (1968) (holding witness incompetent due to lack of scientific acceptance); State v. Cary, 49 N.J. 343, 230 A.2d 384 (1967); *on remand* 99 N.J. Super. 323, 239 A.2d 680; *aff'd* 56 N.J. 16, 264 A.2d 209 (1970) (holding scientific acceptance inadequate to permit judicial notice). In the latter case, the trial court on remand failed to consider the possibility that the voiceprint was proven sufficiently accurate to be admissible without regard to the judicial notice question. Thus the decision was technically on the wrong grounds though the result was undoubtedly correct.

for its use by training and experience.[10] Following the showing of competency of the witness, scientific evidence should be admitted.[11]

In the instant case the Supreme Court of Minnesota noted that the voiceprint would complement voice identifications by ear and make them more reliable, provided the spectrograms were prepared and interpreted by trained examiners. The court pointed out the increased scientific acceptance of the device as a means of voice identification. Therefore the court, without expressing opinion as to the admissibility of the voiceprint standing alone, held the voiceprints admissible, so long as taken by a trained technician, to corroborate or impeach voice identifications by ear. The court indicated that questions of the statistical accuracy of identifications by voiceprint should not affect the admissibility of the evidence, since those are questions of credibility. The court found self-incrimination arguments based on the surreptitious taping of the accused's voice insubstantial, terming the voice a physical characteristic outside the purview of the fifth amendment.[12] Accordingly, the court concluded that the requirement of probable cause for the issuance of arrest and search warrants was satisfied, and the writ of habeas corpus was properly discharged.

While the ruling in the instant case was the first appellate decision finding the voiceprint admissible, no novel principles of law were involved. The decision represents a change in the scientific opinion toward the use of the voiceprint for identification from an unfavorable view[13] to a generally favorable one.[14] While the court in the instant case expressed no opinion on the admissibility of the voiceprint standing alone, inferentially the court has endorsed the voiceprint as a reliable scientific means of identification. Any other reading of the opinion would create the evidential monster of evidence sufficiently reliable on the identity question to permit admission for corroboration or impeachment of aural identifications, but insufficiently accurate to permit admission on the question of identity standing alone. On the basis of the shift in scientific opinion, other courts may be expected to welcome the voiceprint as an additional weapon in the unending search for truth.[15]

David S. Raines

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[10] J. WIGMORE, *supra* note 5.

[11] An excellent example of this approach to relevancy and competency, following judicial notice of a technique's scientific acceptance is State v. Graham, 322 S.W.2d 188 (Mo. App. 1959).

[12] *See* Schmerber v. California, 384 U.S. 757 (1966).

[13] B. Kamine, *The Voiceprint Technique: Its Structure and Reliability,* 6 SAN DIEGO L.R. 213 (1969).

[14] A discussion of the present scientific attitude toward voiceprint identifications may be found in United States v. Raymond, 337 F. Supp. 641 (D.C. Cir. 1972).

[15] Recently a federal district court found the voiceprint admissible after proof on facts very similar to those in the instant case without a corroborating aural voice identification. United States v. Raymond, 337 F. Supp. 641 (D.C. Cir. 1972).

CRIMINAL PROCEDURE — SELF-INCRIMINATION — MINOR'S REQUEST TO CONSULT PARENTS BEFORE INTERROGATION IS CONSTRUED TO BE AN INVOCATION OF HIS FIFTH AMENDMENT PRIVILEGE UNDER MIRANDA

Appellant, a sixteen-year-old minor,[1] was prosecuted in a California state court on two counts of murder and a third count of assault with intent to commit murder. After the arrest and before the interrogation, appellant's request to see his parents was refused.[2] After advising appellant of his rights under *Miranda v. Arizona*[3] and after receiving from appellant a knowing waiver of these rights, the police interrogated him and obtained a confession.[4] Appellant contended that the confession was unlawfully obtained since his request to see his parents invoked his fifth amendment privilege under *Miranda*.[5] The prosecution argued that appellant did not give clear notice that he was asserting the privilege, because it was unlikely that the police would understand the request to see his parents as an invocation of the privilege. In the trial court appellant was found guilty as charged on the two counts of murder and sentenced.[6] The intermediate appellate court affirmed.[7] On appeal to the California Supreme Court, *held,* reversed. When a minor is taken into custody and is subjected to interrogation without the presence of an attorney, his request to see one of his parents, made at any time prior to or during questioning, must in the absence of evidence demanding a contrary conclusion, be construed to indicate that the minor desires to invoke his fifth amendment privilege. Such invocation will render any confession obtained by subsequent questioning inadmissible. *People v. Burton,* 6 Cal. 3d ____, 491 P.2d 793, 99 Cal. Rptr. 1 (1971).

The fifth amendment provides that "[n]o person shall . . . be compelled in any Criminal Case to be a witness against himself. . . ."[8] In 1964 the Supreme Court decided that the fourteenth amendment's due process clause applies the fifth amendment to the states as well as to

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[1]CAL. WELF. & INST. CODE §606 (West 1966). All that is needed to confer jurisdiction from juvenile court to criminal court to try a minor over the age of sixteen is proof of the juvenile court's finding of unfitness. People v. Machado, 150 Cal. 2d 190, 309 P.2d 903 (1957).

[2]During the process of booking, appellant's father arrived at the police station. Each requested to see the other, but permission was refused.

[3]384 U.S. 436, 444-45 (1966).

[4]Appellant made statements on three separate occasions in which he (1) admitted the assault, (2) admitted being present at both murders for which he was charged, but denied doing the shooting, (3) admitted the shooting and explained the circumstances in detail.

[5]384 U.S. at 442-45.

[6]Appellant was found guilty of assault on the third count, a lesser offense than that charged.

[7]People v. Burton, 2 Crim. 18352 (Cal. Dist. Ct. App. 1971).

[8]U.S. CONST. amend. V.

the federal government.[9] Before *Escobedo v. Illinois*[10] the Court had developed the general rule that a confession obtained involuntarily by physical or psychological coercion was inadmissible.[11] The Court qualified the voluntary-involuntary confession in *Escobedo* and extended the accused's sixth amendment right-to-counsel privilege to the interrogation process to protect the fifth amendment privilege at that stage of the proceeding.[12] In the 1966 landmark decision of *Miranda v. Arizona*[13] the Court attempted to clarify the ambiguity of *Escobedo* "and to give concrete constitutional guidelines for law enforcement agencies and courts to follow."[14] Under the principles laid down in *Miranda*, the suspect must be warned sufficiently of his self-incrimination privilege.[15] In addition to the warnings the accused must have the opportunity throughout the interrogation to exercise his fifth amendment privilege.[16] Moreover, if he states that he wants an attorney, further questioning is not permitted until an attorney is present.[17] Concerning waiver of the privilege, *Miranda* explains that in the absence of counsel the prosecution has the heavy burden of showing that the suspect knowingly and intelligently waived the privilege,[18] and a silent record raises no presumption of waiver.[19] The development of the law since *Miranda* has

[9]Malloy v. Hogan, 378 U.S. 1 (1964).

[10]378 U.S. 478 (1964).

[11]Note, *Criminal Procedure—Miranda Warnings In Criminal Tax Fraud Cases,* 42 Miss. L. J. 117, 120 (1971).

[12]*Id.* at 120. For an analysis of the development of the constitutional privilege against self-incrimination from the early common law through the Court's ruling in *Escobedo, see* Herman, *The Supreme Court and Restrictions on Police Interrogation,* 25 Ohio St. L. J. 449 (1964); Sutherland, *Crime and Confession,* 79 Harv. L. Rev. 21 (1965).

[13]384 U.S. 436 (1966).

[14]Williams, *The Criminal Versus Society: Some Observations on the Accommodation of Mississippi Criminal Procedure to the Evolving Concepts of "Constitutionalized" Due Process,* 38 Miss. L. J. 57, 65 (1966).

[15]The *Miranda* warnings require that a suspect be informed prior to any questioning that he has the right to remain silent, that any statement he makes may be used against him, that he has a right to presence of counsel, and that if he is indigent, the government will appoint counsel for him. 384 U.S. at 442-45, 467-73.

[16]*Id.* at 473-74. The Court said: "If the individual indicates in any manner, at any time, prior to or during questioning, that he wishes to remain silent, the interrogation must cease."

[17]*Id.* at 474.

[18]*Id.* at 475.

[19]*Id.* at 475; Carnley v. Cochran, 369 U.S. 506, 516 (1962); People v. Salcido, 246 Cal. App. 2d 450, 54 Cal. Rptr. 820, 823. (Cal. Dist. Ct. App. 1966). Commenting on *Miranda* the court in *Salcido* said:

> We do not believe . . . that the cases hold that the defendant must expressly state that he does not wish to be represented by counsel before a waiver can occur. They simply hold that a silent record is insufficient. They also indicate that the mere silence of the defendant, after he has been advised of his rights, as an isolated fact, is not a waiver. [People v. Salcido, 246 Cal. App. 2d 450, 54 Cal. Rptr. at 823.]

been aimed at answering at least two questions: "(1) [A]t what stage in the proceeding should the warnings be given; and (2) what type of evidence should be protected by the privilege against self-incrimination."[20] The Supreme Court has not yet faced the issue of whether a minor's request to see his parents constitutes an invocation of his fifth amendment privilege against self-incrimination, although the Court did address a similar issue in *In re Gault*.[21] The California Supreme Court has a line of decisions dealing with the question of what behavior, other than a specific assertion, is necessary to constitute an invocation of the fifth amendment privilege.[22] In *People v. Fioritto*[23] the court held that a refusal to sign a waiver amounted to an invocation of the fifth amendment; in *People v. Ireland*[24] the court held that when the suspect stated, "Call my parents for my attorney," he thereby asserted the privilege; and in *People v. Randall*[25] the court held that a suspect's phone call to his attorney, in and of itself, invoked the privilege.

In the instant case the court noted that *Miranda* protects the fifth amendment privilege by obligating police to terminate interrogation if the accused expresses a wish in any manner at any time to remain silent.[26] The court concluded that a minor, when taken into custody and subjected to interrogation without the presence of counsel, may assert the privilege at any time. Relying on *Ireland,*[27] which held that a suspect may indicate such a wish in many ways, and recognizing that *Randall*[28] held that any words or conduct which reasonably appear inconsistent with the suspect's willingness to discuss his case freely with police must be interpreted as an invocation of the privilege, the court further concluded that a minor's request to see his parents must be construed to mean that he is invoking the privilege. Considering whether appellant waived his privilege, the court followed *Randall,* which rejected the voluntary character of any statements resulting from police questioning after the initial assertion of the privilege and held that the admission of

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[20]Note, *Selective Service Law—Criminal Procedure—Local Board Must Give Miranda Warning Before Requesting Registrant to Produce Evidence Necessary for Prosecution,* 23 VAND. L. REV. 892, 893 (1970).

[21]387 U.S. 1 (1967). The Court held that the privilege against self-incrimination is applicable in a juvenile hearing and that the juvenile must be advised that he does not have to testify or make a statement. *Id.* at 55. Nevertheless, the Court reserved the question as to whether the admissibility of pre-hearing statements made by juveniles to police officers is governed by the requirements of *Miranda.* The Court said: "[W]e are not here concerned with the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process. . . ." *Id.* at 13.

[22]People v. Randall, 1 Cal. 3d 948, 464 P.2d 114, 83 Cal. Rptr. 658 (1970); People v. Ireland, 70 Cal. 2d. 522, 450 P.2d 580, 75 Cal. Rptr. 188 (1969); People v. Fioritto, 68 Cal. 2d 714, 441 P.2d 625, 68 Cal. Rptr. 817 (1968).

[23]68 Cal. 2d 714, 441 P.2d 625, 627, 68 Cal. Rptr. 817 (1968).

[24]70 Cal. 2d. 522, 450 P.2d 580, 588, 75 Cal. Rptr. 188 (1969).

[25]1 Cal. 3d 948, 464 P.2d 114, 120, 83 Cal. Rptr. 658 (1970).

[26]Miranda v. Arizona, 384 U.S. at 473-74.

[27]70 Cal. 2d 522, 450 P.2d 580, 587, 75 Cal. Rptr. 188 (1969).

[28]1 Cal. 3d 948, 464 P.2d 114, 119, 83 Cal. Rptr. 658 (1970).

this confession constituted reversible error even though it was preceded by a knowing and intelligent waiver.[29]

The California court has taken a significant step toward broadening the fifth amendment protection against self-incrimination for minors in criminal prosecutions. It has broadened the boundaries of both *Miranda* and *Gault* in determining what constitutes an invocation of the privilege in the context of these particular facts. The court's decision was a logical extension of the recent trend in this area,[30] and it was a warranted step in light of the purposes to be served by this trend. Certainly a minor must have broad protection of the privilege. Because of his physical and psychological immaturity he needs even greater protection than an adult.[31] Few adolescents can resist intense interrogation of adult police officers. The fact that appellant in the instant case called for his parents rather than a lawyer indicates that he was overpowered by the threatening circumstances. In view of the United States Supreme Court's holdings in this line of cases,[32] it seems logical to conclude that if the Court faces this precise issue in the future, it will affirm the position in the instant case. A minor's right against self-incrimination cannot effectively be protected apart from his parent's presence any more than an adult's right can be protected apart from an attorney's presence. It is hoped that the instant decision will become a new national standard in the custodial interrogation of minors facing criminal prosecution and thereby increase the significance of the self-incrimination privilege as a constitutional protection.

William Youngblood

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[29]*Id.*, 464 P.2d at 120, 83 Cal. Rptr. at 664.

[30]People v. Fioritto, 68 Cal. 2d 714, 441 P.2d 625, 68 Cal. Rptr. 817 (1968); People v. Ireland, 70 Cal. 2d 522, 450 P.2d 580, 75 Cal. Rptr. 188 (1969); People v. Randall, 1 Cal. 3d 948, 464 P.2d 114, 83 Cal. Rptr. 658 (1970).

[31]Comment, *In re Gault and the Privilege Against Self-Incrimination in Juvenile Court*, 51 MARQ. L. REV. 68, 81 (1967). The Supreme Court took this position in Haley v. Ohio, 332 U.S. 596, 599 (1948), and again in Gallegos v. Colorado, 370 U.S. 49, 54 (1962). In *Haley* the Court said:

> Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces. A 15-year-old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition. Mature men possibly might stand the ordeal. . . . But we cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom he can lean lest the overpowering presence of the law, as he knows it, crush him. 332 U.S. at 599-600.

[32]*In re* Gault, 387 U.S. 1 (1967); Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Malloy v. Hogan, 378 U.S. 1 (1964); Gallegos v. Colorado, 370 U.S. 49 (1962); Haley v. Ohio, 332 U.S. 596 (1948).

TORT LAW — MUNICIPAL IMMUNITY — REPLACEMENT OF A STOP SIGN IS A GOVERNMENTAL FUNCTION

Appellants, the family of a minor who was killed in an automobile intersectional collision, sought to recover damages from the city of Gulfport for the wrongful death[1] of the minor. The automobile in which the deceased minor was a passenger entered the intersection from the north and was struck by an eastbound automobile which had entered from the west. A stop sign, which had been erected by the city to direct eastbound traffic, was missing.[2] Appellants' accusation of city negligence was countered by the city's contention that it was immune from tort liability for the negligent performance of governmental functions.[3] The trial court sustained the city's motion for a directed verdict[4] on the basis that the function involved was governmental rather than proprietary.[5] On appeal to the Mississippi Supreme Court, *held*, affirmed. When a traffic control device has been completely removed and no ordinance requires the city to maintain one at the intersection, the decision of whether to erect another traffic control device is a governmental function for which the city will be immune from tort liability if it fails to perform. *Wall v. City of Gulfport,* 252 So. 2d 891 (Miss. 1971).

Municipal tort immunity is based upon the theory that a municipality is an agent of the sovereign state. The first exhibition of local government immunity was in England in 1788.[6] The English court provided the county with immunity from liability for damages resulting from the collapse of a defective bridge. The English common law doctrine of sovereign immunity was amended fifty-four years later by an American court decision[7] which divided municipal functions into either pro-

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[1]MISS. CODE ANN. §1453 (Supp. 1971), which allows the family of a deceased minor to bring an action when an action could have been brought by the deceased had he not died.

[2]The sign had been blown away by a hurricane two and one-half months prior to the accident.

[3]Governmental functions may be considered to be those functions which only the government can adequately perform. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 131, at 979 (4th ed. 1971).

[4]The trial court indicated that even if the city had a duty to replace the sign, the city was not liable since the absence of the sign was not a proximate cause of the collision. Although the suit had included the driver of the eastbound car as a defendant, the appellants took a voluntary nonsuit as to him in order to appeal the court's dismissal of the suit as to the city. Wall v. City of Gulfport, 252 So. 2d 891, 892-3 (Miss. 1971).

[5]Proprietary functions may be considered to be those functions which a private corporation could just as easily perform. W. PROSSER, *supra* note 3, § 131, at 980.

[6]Russell v. Men of Devon, 2 T.R. 667, 100 Eng. Rep. 359 (K.B. 1788).

[7]Bailey v. City of New York, 3 Hill 531, 38 Am. Dec. 669 (N.Y. 1842).

prietary[8] or governmental[9] functions. This "American doctrine" of municipal tort liability[10] has the inherent problem of determining where to draw the line between the two functions.[11] While performing governmental functions a municipality, as an agent of the state, is not liable for its tortious acts.[12] In contrast, almost all American courts had recognized municipal liability for the negligent performance of its proprietary functions by the close of the nineteenth century.[13] Through the years the Mississippi courts have usually construed functions falling in the gray area as being proprietary.[14] One area of municipal activity which most courts considered to be immune from liability was traffic regulation.[15] The operation and maintenance of traffic signals were considered to be within the municipality's police powers[16] and as such were governmental functions. The operation and maintenance of streets, however, were not within the protected area.[17] The planning of location of public improvements[18] and the decision to erect traffic signals at designated locations[19] were considered to be governmental functions. Although some

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[8]Bathke v. Traverse City, 308 Mich. 1, 13 N.W.2d 184, 187 (1944), wherein the operation of an airport by the city was considered held to be a proprietary function; Brummett v. City of Jackson, 211 Miss. 116, 120, 51 So. 2d 52, 53 (1951), wherein the operation of an an airport by the city was held to be a proprietary function; Nestman v. South Davis County Water Imp. Dist., 16 Utah 2d 198, 398 P.2d 203, 205 (1965), wherein the supplying of water for a fee was held to be a proprietary function.

[9]Powell v. Village of Fenton, 240 Mich. 94, 214 N.W. 968, 969 (1927), wherein the fighting of fires was held to be a governmental function; Moore v. Greesboro, 191 N.C. 592, 132 S.E. 565 (1926), wherein the operation of a sewerage system was held to be a governmental function.

[10]Barnett, *The Foundations of the Distinction Between Public and Private Functions in Respect to the Common-Law Tort Liability of Municipal Corporations,* 16 Ore. L. Rev. 250, 269 (1937).

[11]City of Hattiesburg v. Geigor, 118 Miss. 676, 79 So. 846 (1918).

[12]Doddridge, *Distinction Between Governmental and Proprietary Functions of Municipal Corporations,* 23 Mich. L. Rev. 325, 333 (1925).

[13]Kramer, *The Governmental Tort Immunity Doctrine in the United States 1790-1955,* 1966 U. Ill. L. F. 795, 815.

[14]Vinsel, *Liabilities of Municipal Corporations in Mississippi,* 3 Miss. L. J. 298, 317 (1931).

[15]Sandmann v. Sheehan, 279 Ky. 614, 131 S.W.2d 484, 487 (1939); Hammell v. City of Albuquerque, 63 N.M. 374, 320 P.2d 384, 386 (1958), wherein a city was held to be immune from liability for damages resulting from its failure to replace a stop sign; *cf.* Kamnitzer v. City of New York, 265 App. Div. 636, 40 N.Y.S.2d 139, 142 (1943). *Contra,* Tucker v. City of Okolona, 227 So. 2d 475 (Miss. 1969), wherein a city was held liable for damages resulting from a defective stop light.

[16]Hammell v. City of Albuquerque, 63 N.M. 374, 320 P.2d 384, 386 (1958).

[17]Kirk v. City of Muskogee, 183 Ok. 536, 83 P.2d 594, 596 (1938).

[18]Johnston v. City of East Moline, 405 Ill. 460, 91 N.E.2d 401, 404 (1950).

[19]Raven v. Coates, 125 So. 2d 770, 771 (Fla. Dist. Ct. App. 1961).

jurisdictions have not strayed from those distinctions,[20] the trend has been to broaden the range of municipal tort liability.[21]

To broaden the dimension of liability and to curb the harshness of the immunity doctrine, other tests have been added to determine municipal liability,[22] but nevertheless, the governmental-proprietary distinction still exists.[23] The major test added was simply another choice of labels test; the court would determine whether the function was discretionary or ministerial.[24] A discretionary function is normally the act of making a decision and is generally classified as a governmental function.[25] A ministerial function is the physical fulfillment of a decision made through a discretionary function. It is usually classified as a proprietary function[26] and is without immunity from liability. In contrast, discretionary functions have been given immunity when negligently exercised[27] and, in most instances, even when there has been a failure to exercise the function.[28] The courts' utilization of this test has resulted in a realignment of municipal activities in relation to immunity. The maintenance of traffic regulatory devices has shifted from its former position of immunity, as a police power,[29] to a position labelled as a ministerial function[30] with the resulting liability. Discretionary functions are not, however, totally immune from liability. If its performance or nonperformance violates an ordinance, liability may follow.[31] Many courts have brought discretionary functions within the realm of liability by the use of statutes capable of broad interpretation.[32] In 1957 Florida initiated what appears to be the approaching end to municipal tort immunity

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[20]Voigt v. City of Corpus Christi, 419 S.W.2d 445, 447 (Tex. 1967), wherein a city was not held liable for damages resulting from a defective stop light.

[21]Vinsel, *supra* note 14.

[22]Smith, *Municipal Tort Liability*, 48 MICH. L. REV. 41, 45 (1949). Municipal liability would arise if the city's conduct was a nuisance, or if the damage resulted from a "ministerial" act, or if negligent maintenance of property by the city caused the damage.

[23]Antieau, *The Tort Liability of American Municipalities*, 40 KY. L. J. 131, 133 (1952).

[24]*See* Jones v. Sioux City, 185 Iowa 1178, 170 N.W. 445, 449 (1919).

[25]Borchard, *Government Liability in Tort*, 34 YALE L. J. 129, 133 (1924).

[26]*Id.*

[27]Avey v. City of West Palm Beach, 152 Fla. 717, 12 So. 2d 881, 882 (1943). A city's decision not to repair a defective stop light caused an accident, but the court ruled the city to be immune from liability.

[28]Blachly & Oatman, *Approaches to Governmental Liability in Tort: A Comparative Survey*, 9 LAW & CONTEMPORARY PROBLEMS 181, 190 (1942).

[29]Antieau, *supra* note 23.

[30]Tucker v. City of Okolona, 227 So. 2d 475 (Miss. 1969).

[31]Buckley v. City of Chicago, 3 Ill. App. 2d 39, 120 N.E.2d 375, 376 (Ill. App. Ct. 1954).

[32]Phillips v. Town of Fort Oglethorpe, 118 Ga. App. 62, 162 S.E.2d 771, 772 (1968), wherein a city failed to repair a stop light and the court ruled that the city had violated a statutory duty to keep the streets in a reasonably safe condition for travel; O'Hare v. City of Detroit, 362 Mich. 19, 106 N.W.2d 538, 541-42 (1960).

by rejecting the doctrine completely.[33] Several states have followed by discarding their own municipal tort immunities,[34] but the majority of states continue to apply the municipal tort immunity doctrine.[35]

Recognizing the current trend in municipal tort law, the Mississippi Supreme Court in the case at bar cited two other court decisions which held municipalities liable for violating ordinances requiring the replacement of stop signs.[36] The present court was unable to discover such a violation upon which it could rely in the record of this case. An earlier decision by this court was distinguished by the present court on the ground that failure to repair a defective traffic light could render a street unsafe for persons using ordinary care and caution for their own safety,[37] while failure to replace a completely removed stop sign would not. The present court concluded that without an ordinance requiring replacement, a city's decision to replace a completely removed stop sign is a governmental function.

Although the present court distinguished this case from *Tucker v. City of Okolona*[38] on the basis of the different factual situations, the recent expansion of municipal tort liability in Mississippi may have been extended further by the case at bar. It may appear that the expansion is a retreat from the governmental-proprietary distinction.[39] A more realistic view is that merely a new line of demarcation has been drawn between the two functions. The present court's projection that violation of a city ordinance would be a justifiable ground for relief has labelled some discretionary functions as proprietary functions. Although the Mississippi Supreme Court has not yet chosen to depart from "that ancient battlefield, the 'governmental-proprietary' dichotomy,"[40] the burden of carrying the costs of public benefits, which has been borne by only a few injured individuals rather than the public at large,[41] appears to have been lightened somewhat. The present court could have easily reached the same result without using the veil of governmental-proprietary distinctions. Had it cast aside that out-dated doctrine, the present court could have better related its rule of law to the reality of the facts presented. With the decision in the instant case the court ex-

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[33]Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957).

[34]Note, *Municipal Corporations—The Governmental—Proprietary Distinction and Municipal Tort Immunity Begin to Fall in Mississippi,* 41 Miss. L.J. 471, 481 (1970).

[35]Note, *Municipal Liability in Proprietary and Governmental Functions,* 7 J. Pub. L. 503, 506 (1958).

[36]Buckley v. City of Chicago, 3 Ill. App. 2d 39, 120 N.E.2d 375 (Ill. App. Ct. 1954); Grantham v. City of Topeka, 196 Kan. 393, 411 P.2d 634 (1966).

[37]Tucker v. City of Okolona, 227 So. 2d 475 (Miss. 1969).

[38]*Id.*

[39]*See, e.g.,* Note, *Municipal Corporations—The Governmental—Proprietary Distinction and Municipal Tort Immunity Begin to Fall in Mississippi, supra* note 34, at 471-73.

[40]Comment, *A Case for the Abrogation of Municipal Tort Immunity in Mississippi,* 41 Miss. L.J. 289, 300 (1970).

[41]Smith, *supra* note 22, at 56.

pressed a desire to be consistent. Furthermore, the court feels that the proper body to abolish the municipal tort immunity doctrine is the legislature.[42] These, however, are insufficient justifications for not expanding liability to those who should pay in all such cases — the municipality. "Judicial consistency under the doctrine of *stare decisis* loses its virtue when it conflicts with common sense and present social needs."[43] Those who demand judicial abolition of municipal tort immunity[44] may have to settle merely for modification of the doctrine, but their argument for the judiciary to take the initiative seems a proper one.

John Haley

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[42]Anderson v. Vanderslice, 240 Miss. 55, 58, 126 So. 2d 522, 523 (1961) (dictum).

[43]Brinkman v. City of Indianapolis, 141 Ind. App. 662, 231 N.E.2d 169, 173 (1967).

[44]Price & Smith, *Municipal Tort Liability: A Continuing Enigma,* 6 U. FLA. L. REV. 330 & n. 1 (1953).

CRIMINAL PROCEDURE — VAGRANCY ORDINANCE IS VOID FOR VAGUENESS

Petitioners[1] were arrested under various circumstances, and each was subsequently convicted of violating a Jacksonville, Florida, vagrancy ordinance.[2] Petitioners appealed from the Florida municipal court, alleging that the ordinance was void for vagueness. Respondent contended that the ordinance is necessary to deter vagabondage and prevent crimes.[3] The Florida Circuit Court affirmed, the Florida District Court of Appeals denied certiorari. On certiorari to the United States Supreme Court, *held,* reversed.[4] When a vagrancy ordinance fails to give fair notice of what conduct is forbidden and encourages arbitrary arrests and convictions, it is void for vagueness on both counts. *Papachristou v. City of Jacksonville,* 92 S.Ct. 839 (1972).

The reasons for the initial vagrancy laws bear no relevance to modern society. The early laws were enacted because the decaying feudal system and the subsequent Black Death produced alarming labor short-

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[1]The petitioners were arrested on various charges of vagrancy which included prowling by auto, vagabondage, loitering, being a common thief, disorderly loitering on the street, disorderly conduct — resisting arrest with violence. As an example of the general application of the vagrancy statute, Papachristou and three other defendants were charged with "prowling by auto." The arrest was made because the petitioners had stopped near a used car lot which had been broken into several times. On the night in question, however, there was no evidence of any breaking and entering.

[2]JACKSONVILLE, FLA., ORDINANCE CODE §26-57 provided at the time of the arrests and convictions as follows:

> Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants and, upon conviction in the Municipal Court shall be punished as provided for Class D offenses. [as cited in Papachristou v. City of Jacksonville, 92 S. Ct. 839, 840 at n. 1 (1972)].

[3]Brown v. Jacksonville, 236 So. 2d 141 (Dist. Ct. App. Fla. 1970); Johnson v. State, 202 So. 2d 852 (Fla. 1967). *Johnson* was later reversed by the United States Supreme Court on grounds that the particular conduct did not constitute vagrancy. The Court did not consider the constitutionality of the statute. 391 U.S. 596 (1968); 111 ALR 68; 25 ALR 3d 805 §4.

[4]Under the Florida state court system it is not necessary to appeal to the Florida Supreme Court before seeking certiorari to the United States Supreme Court. The Florida District Court of Appeals is considered a final tribunal for purposes of exhausting state remedies.

ages.[5] From this birth on English soil the crime of vagrancy crossed the Atlantic early in American history; today it is recognized in all fifty states.[6] The common component of this crime is that the offenders are placed in a certain "status" because of their antisocial conduct.[7] Common examples of such "statuses" are tramps, habitual loafers, gamblers, prostitutes, and beggars.[8] More general categories are unemployed able-bodied persons, persons leading an idle, immoral life without visible means of support, and wanderers.[9] Preventing crime from occurring and arresting persons for suspicion are the primary justifications for such statutes today.[10] Constitutional attacks[11] on the validity of such laws have focused on whether these classifications are too general, lacking of definition, and discriminatory.[12] Many jurisdictions have bent over backwards in finding that their respective vagrancy statutes do not usurp constitutional guaranties.[13] A few courts, while not desiring to declare their law unconstitutional, have held that a particular mode of conduct does not fall into the general classifications under the statute.[14] Undaunted the statutes' foes have relentlessly maintained that the statutes are unduly vague.[15]

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[5]16 Douglas, *Vagrancy and Arrest on Suspicion,* 70 YALE L.J. 1 (1960).

[6]Vagrancy is a statutory offense in all states except West Virginia, where it is a common law offense. Sherry, *Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision,* 48 CALIF. L. REV. 557 (1960).

[7]Jenkins v. United States, 146 A.2d 444, 447 (D.C. 1958).

[8]Lacey, *Vagrancy and Other Crimes of Personal Condition,* 66 HARV. L. REV. 1203 (1953).

[9]111 ALR 3rd 68; MISS. CODE ANN. §2666 (1956).

[10]As the courts have applied stricter standards to what constitutes "probable cause," law enforcement officials have utilized vagrancy laws to enable them to arrest persons for vagrancy as a smokescreen for suspicion of more serious crimes. *See* Recent Decisions, 4 AKRON L. REV. 231 (1971); Walsh, *Vagrancy: A Crime of Status,* 2 SUFFOLK U.L. REV. 156, 169 (1968).

[11]Arguments for unconstitutionality are based on the freedom of speech and right to peacefully assemble provisions in the first amendment and the due process clause in the fifth amendment.

[12]Two persons might be engaged in the same activity or conduct, such as loitering, and one without means might be found guilty of loitering and the other with cash on his person might be released. It is the discriminatory application of such statutes which has formed the backbone of the contention that such laws are void for arbitrariness. *See* Walsh, *Vagrancy: A Crime of Status,* 2 SUFFOLK U.L. REV. 156 (1968).

[13]Wallace v. State, 224 Ga. 255, 161 S.E.2d 288 (1968); Ricks v. United States, 228 A.2d 316 (D.C. Ct. App. 1967); Johnson v. State, 202 So. 2d 852 (Fla. 1967); Adamson v. Hoblitzell, 279 S.W.2d 759 (Ky. 1955); Portland v. Goodwin, 187 Or. 409, 210 P.2d 577 (1949); Phillips v. Municipal Court of Los Angeles, 24 Cal. App. 2d 453, 75 P.2d 548 (1938); Morgan v. Commonwealth, 168 Va. 731, 191 S.E. 791 (1937); New Orleans v. Postek, 180 La. 1048, 158 So. 553 (1934).

[14]Note, *Vagrancy: A Constitutional Battle,* 16 SYRACUSE L. REV. 646, 655 (1964-65).

[15]"Though the very concept of crimes of condition involves uncertainty about when the condition attaches and when it ceases to exist, those attacks for vagueness which have been successful have hit at particular statutory language and not at the entire concept of crimes of condition." Lacey, *supra* note 8, at 1221.

In the instant case the Court held that persons are entitled to know what the state of the law is and what conduct is to be avoided. The opinion pointed out that because of vagueness the average citizen probably would not be able to discern when he was committing an offense. The wording of the ordinance evidences "the absence of 'ascertainable standards of guilt.' "[16] The Court also found vagueness in the act as a result of the unshackled discretion it placed in the hands of the police to arrest for mere suspicion, which is a lesser standard than "probable cause."[17] The Court was concerned that "[a] vagrancy prosecution may be merely the cloak for a conviction which could not be obtained on the real but undisclosed grounds for the arrest."[18] Therefore the unanimous opinion concluded that the ordinance was void for vagueness since it fails to give fair notice of forbidden conduct and because it encourages arbitrary arrests.

The present case indicates a continuing awareness of the Court for protection of due process concepts and freedom of movement. Perhaps equally important is the Court's concern for the right of an individual to "follow the beat of a different drum," even if the path leads to a life of non-conformity and idleness. While the prevention of crime is certainly a valid state interest, the corollation between crime and idleness was not sufficiently proven in *Papachristou v. City of Jacksonville.* Even if such a corollation were established, due process dictates that a person be aware of conduct which is deemed criminal in nature. Hopefully, *Papachristou* will provide the impetus for state and city law-making bodies to review similar statutes and ordinances and bring them into line with this decision. If such legislative bodies are reluctant to act, hopefully state courts will read *Papachristou* as the death toll for similar broad vagrancy statutes and ordinances and take the initiative in declaring the laws unconstitutional. The hue and cry from police officials which has accompanied previous inroads into questionable police tactics will probably not be as spirited with this ruling because of the blatent unconstitutionality of the law. Nevertheless, recognizing that crime prevention is equally as important as crime solution, law enforcement agencies will and should seek other techniques for ferreting out potential criminals. *Papachristou* emphasizes, however, that future methods must not cast such a wide net as to snag innocent bystanders in the process.[19] Legislative draftsmen should keep in mind that crime preventive techniques must conform to general "probable cause" requirements since the courts do not presently recognize a separate criteria for "suspicious persons."

Niles McNeel

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[16] 92 S. Ct. 839, 845 (1972).

[17] *Supra* note 10.

[18] 92 S. Ct. 839, 847 (1972).

[19] *Id.* at 845; Williams v. State, 130 Miss. 827, 844, 94 So. 882, 884 (1922) (dissenting opinion).

ATTORNEY AND CLIENT — COMPENSATION — CONTINGENT FEE CONTRACTS VOID IN MATRIMONIAL CASES

Seeking alternatively damages or to set aside a deed executed pursuant to a contingent fee contract conditioned upon obtaining a divorce,[1] a client sued her former attorney in chancery court, alleging violation of trust and undue influence. Defendant attorney had previously represented complainant in a divorce proceeding, and they had entered into the contingent fee contract which gave rise to the instant litigation.[2] The Chancery Court of Panola County dismissed the bill upon the ground that the complainant had failed to meet the burden of proof to sustain the allegations. On appeal the Mississippi Supreme Court, *held,* reversed. A contingent fee contract in a matrimonial action is void as violative of public policy.[3] *Avant v. Whitten,* 253 So. 2d 394 (Miss. 1971).

It is established by the great weight of authority in this country that contingent fee arrangements in divorce cases are unenforceable.[4] The rule applies both when the compensation for an attorney's service is contingent upon the securing of a divorce[5] and when the amount to be paid for an attorney's service is proportioned to the amount of alimony received.[6] Although courts have consistently reached this conclusion, various jurisdictions have advanced different reasons for the same result. Most often courts couch their objections to contingent fee divorce contracts in terms of public policy,[7] suggesting that the personal interest

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[1]The contract involved provided: "33 acres of land located in Panola County, Mississippi, Attorney Fee — Fifty percent (50%) of anything recovered either personal property or land — This is action for divorce and to recover one-half ½ of 33 acres of land."

[2]Complainant had previously attempted and failed to obtain a divorce prior to employing defendant. After complainant's execution of the contingent fee contract, defendant filed a bill for divorce on grounds of "constructive desertion." Subsequently, complainant and her husband divided the land by exchanging quitclaim deeds. Thereafter, complainant's bill was voluntarily dismissed, and an uncontested divorce was ultimately granted to the husband on his cross-bill.

[3]Since the land itself was conveyed to innocent purchasers and thus beyond reach, the court allowed the complainant-appellant to recover the value of the land conveyed, less an appropriate attorney fee determined on a quantum meruit basis. The claim for punitive damages, not allowable in a court of equity, was dismissed.

[4]*See* 7 AM. JUR. 2d *Attorneys at Law* §§ 166, 217 (1963); 17 C.J.S. *Contracts* § 235 (1963); Annot., 30 A.L.R. 189 (1924).

[5]*In re* Sylvester, 195 Iowa 1329, 192 N.W. 442 (1923).

[6]McConnell v. McConnell, 98 Ark. 193, 136 S.W. 931 (1911); McCarthy v. Santangelo, 137 Conn. 410, 78 A.2d 240 (1951); 24 AM. JUR. 2d *Divorce and Separation* § 532 (1966).

[7]"The rationale of the blanket voidance rule is similar to that which prohibits a trustee from selling trust property to himself, regardless of the lack of fraud or the fairness of the price, unless all beneficiaries consent. The fear is that the contingent

of the attorney in procuring the divorce contradicts the public interest in effecting a reconciliation.[8] Generally the law does not favor divorce,[9] and the proper maintenance of the marriage relation is a matter of public concern.[10] A contract to procure a divorce contravenes public policy and is void.[11] A contingent fee contract for procurement of divorce, giving the attorney a personal interest[12] in preventing a reconciliation between the parties,[13] is at odds with the good order of society and thus unenforceable. [14] There is considerable justification beyond public policy reasons for refusing to enforce a contract to procure a divorce when the fee is contingent upon the amount of alimony ultimately awarded.[15] Alimony is a purely personal right, not a property right, and as such is not prospectively assignable.[16] Moreover, alimony is awarded to provide for the maintenance and support of the wife.[17] It is a fraud upon the court and the husband to seek alimony supposedly based on the necessities of the wife when in truth she has bartered away in ad-

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fee or the opportunity to make a profit by the sale will tempt the lawyer or the trustee to behave in his own interest, but contrary to the interest of those whom he has a duty to serve. In both cases the object is to prevent publicly-condemned behavior by the party enjoying any benefit from the act which has within it the seeds of that behavior." Note, *Attorney and Client — Contingent Fee Contract in Divorce,* 113 U. PA. L. REV. 278 at n. 18 (1964).

[8]*See, e.g.,* the early case of Jordan v. Westerman, 62 Mich. 170, 28 N.W. 826 (1886), which spells out the public policy considerations thusly: "Public policy is interested in maintaining the family relation. The interests of society require that those relations shall not be lightly severed; that families shall not be broken up for inadequate causes, or from unworthy motives; and that where differences have arisen which threaten disruption, public welfare and the good of society demands a reconciliation, if practicable or possible. Contracts like the one in question tend directly to prevent such reconciliation, and, if legal and valid, tend directly to bring around alienation of husband and wife by offering a strong inducement, amounting to a premium, to induce and advise the dissolution of the marriage ties as a method of obtaining relief from real or fancied grievances, which would otherwise pass unnoticed." *Id.,* 28 N.W. at 830.

[9]Shinn v. Shinn, 148 Neb. 832, 29 N.W.2d 629 (1947).

[10]Westerman v. Jordan, 62 Mich. 170, 28 N.W. 826 (1886).

[11]*In re* Sylvester, 195 Iowa 1329, 192 N.W. 442 (1923).

[12]Coleman v. Sisson, 71 Mont. 435, 230 P. 582 (1924), describes the attorney's interest: "Contracts like the one before us, when the attorney is to receive a portion of the money or property obtained from the husband, necessarily tend toward the alienation of husband and wife. The attorney is interested, not in reconciliation, but in alienation. His cupidity serves to direct his action." *Id.* at 444, 230 P. at 585.

[13]For allegations vividly demonstrating the conflict of interest between an attorney employed on a contingent basis and a client seeking a reconciliation, *see* Singleton v. Foreman, 435 F.2d 962, 967 (M.D. Fla. 1970).

[14]Newman v. Freitas, 129 Cal. 283, 61 P. 907 (1900).

[15]*See* 24 AM. JUR. 2d *Divorce and Separation* § 532 (1966).

[16]Blaine v. Blaine, 96 N.J. Super. 460, 233 A.2d 212, 213 (1967); 24 AM. JUR. 2d *Divorce and Separation* § 531 (1966).

[17]*In re* Fisher, 115 Ill. 2d 139, 153 N.E.2d 832, 840 (1958).

vance a portion of that which she is to receive;[18] such contracts effect a misappropriation of the alimony which is designed solely for the wife's maintenance.[19] Finally, though the main justification for allowing contingent fee contracts generally is to insure representation for impecunious persons,[20] a system which customarily taxes the costs of representation to the husband in divorce cases dispenses with the need for contingent fee arrangements for penniless wives.[21]

The general rule prohibiting enforcement of contingent fee agreements in divorce cases is applied in a variety of situations.[22] Most typical is the case in which the wife contracts with the attorney on a contingent basis for dissolution of her marriage and the attorney later seeks to enforce the agreement.[23] But the prohibition has also been applied to expunge a purported attorney's lien on alimony awarded in a contingent fee divorce case.[24] The same result has been reached when the husband initiates the divorce proceedings and the contingent fee contract is concluded between the wife and her attorney in defending the suit.[25] Such contracts are unenforceable whether executed prior to the institution of the divorce proceeding[26] or during its pendency.[27] Even when a contingent fee contract was executed for the purpose of filing a suit for fraud, but the fraud suit was dismissed and a suit for divorce substituted, the original contingent fee contract is unenforceable.[28] Similarly, when the contract to procure a divorce was consummated by a stranger to the marriage, the rule prohibits enforcement by the attorney.[29] The same result occurs whether the contingent fee is for a percentage of the alimony ultimately awarded,[30] whether payable in installments[31] or lump sum,[32] or for a portion of all property secured in

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[18]Lynde v. Lynde, 64 N.J.Eq. 736, 52 A. 694 (1902).

[19]See note 15, *supra.*

[20]Note, *Contingent Fee Contracts: Validity, Controls, and Enforceability,* 47 IOWA L. REV. 942, 943 (1962).

[21]Coons v. Kary, 263 Cal. App. 2d 650, 69 Cal. Rptr. 712, 713 (Cal. Ct. App. 1968); Opperud v. Bussey, 172 Okla. 625, 46 P.2d 319, 323 (1935); Newman v. Freitas, 129 Cal. 283, 61 P. 907, 910 (1900).

[22]*See, e.g.,* Note, *Attorney and Client—Fees—Divorce Cases,* 15 ALA. L. REV. 208, 210 (1962).

[23]*E.g.,* Sobieski v. Maresco, 143 So. 2d 62 (Fla. Dist. Ct. App. 1962).

[24]Barelli v. Levin, 144 Ind. App. 576, 247 N.E.2d 847 (1969).

[25]McDearmon v. Gordon & Gremillion, 247 Ark. 318, 445 S.W.2d 488 (1969); Baskerville v. Baskerville, 246 Minn. 496, 75 N.W.2d 762 (1956).

[26]Coons v. Kary, 263 Cal. App. 2d 650, 69 Cal. Rptr. 712, 713 (Cal. Ct. App. 1968); *In re* Sylvester, 195 Iowa 1329, 192 N.W. 442 (1924); Barngrover v. Pettigrew, 128 Iowa 533, 104 N.W. 904 (1905).

[27]Coleman v. Sisson, 71 Mont. 435, 230 P. 582 (1924).

[28]Wall v. Linder, 159 Colo. 83, 410 P.2d 186 (1966).

[29]Wagner v. Shelly, 241 Mo. App. 259, 235 S.W.2d 414 (1950).

[30]*See* cases cited note 6, *supra.*

[31]Evans v. Hartley, 57 Ga. App. 598, 196 S.E. 273 (1938).

[32]*In re* Sylvester, 195 Iowa 1329, 192 N.W. 442 (1924).

prosecuting all claims in combination with a divorce action.[33] The rule, however, does not bar enforcement of such a contract conditioned on the return of a wife's separate property.[34]

In the instant case, because of the overwhelming weight of authority[35] and particularly in view of the compelling policy considerations,[36] the court predictably held that a contingent fee contract in a matrimonial action violates public policy and is invalid.[37] However, the court did allow the attorney to recover a reasonable fee for the services rendered.[38]

The rule articulated by the Mississippi Supreme Court in *Avant v. Whitten,* following logically from its earlier decision in *Ownby v. Prisock,*[39] is couched in broad language, proscribing enforcement of contingent fee contracts in matrimonial actions.[40] This same language, utilized by the Florida appellate court in *Sobieski v. Maresco,*[41] required clarification three years later in *Salter v. St. Jean.*[42] If a similar situation[43] were to arise, the Mississippi Supreme Court might be called on to modify the rule announced in *Avant* to a proscription of contingent fee

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[33]McDearmon v. Gordon & Gremillion, 247 Ark. 318, 445 S.W.2d 488 (1969).

[34]Salter v. St. Jean, 170 So. 2d 94 (Fla. Sup. Ct. 1964).

[35]Avant v. Whitten, 253 So. 2d 394 (Miss. 1971).

[36]In *Avant* the Mississippi court quotes with approval the language of Jordan v. Westerman, 62, Mich. 170, 28 N.W. 826 (1886) and Barrelli v. Levin, 144 Ind. App. 576, 247 N.E.2d 847, 853 (1969), which declared: "It may well be that a majority of the general public is no longer concerned with whether divorces are socially desirable or undesirable, or whether contracts that are designed to facilitate or promote the granting of divorces are valid. We are not yet ready to say, however, that it is no longer the public policy of the State of Indiana to discourage divorces and to condemn contracts which discourage reconciliations and provide incentives to attorneys to obtain divorces."

[37]253 So. 2d at 396.

[38]*Id.* at 397.

[39]243 Miss. 203, 138 So. 2d 279 (1962), where the Mississippi court first encountered this problem.

[40]253 So. 2d at 396.

[41]*See* Sobieski v. Maresco, 143 So. 2d 62 (Fla. Dist. Ct. App. 1962).

[42]*See* Salter v. St. Jean, 170 So. 2d 94 (Fla. Dist. Ct. App. 1965), in which the Florida appeals court said: "We approve the distinction made by the chancellor and specifically hold that contingent fee agreements in domestic relations litigation are against public policy and unenforceable as they relate to alimony or support or property settlement in lieu thereof, but that same are enforceable when they relate to the return of a wife's separate property." *Id.* at 95.

[43]In Burns v. Stewart, 188 N.W.2d 760 (Minn. 1971), the husband deserted his wife and departed the state taking extensive joint assets of the marriage. The wife executed a contingent fee agreement with her attorney allowing him a percentage of all the personal property recovered from her husband outside the state. Although the attorney secured a divorce for the wife, the contingent fee agreement applied to property obtained in a separate equitable action for the wife's share of their joint assets, and therefore the contract was enforceable.

contracts in divorce actions.[44] Finally, in light of the well settled judicial antipathy toward contingent fee contracts in divorce cases, it is appropriate to consider the consequences for those attorneys who utilize such fee arrangements in these cases. With notable exceptions,[45] most courts which refuse to enforce a contingent fee contract will nevertheless allow a fee pased on *quantum meruit* in divorce cases.[46] On rare occasions attorneys resorting to contingent fee arrangements have been subjected to disciplinary action.[47] The treatment afforded these agreements by the *Code of Professional Responsibility*[48] should fairly apprise solicitors to conscientiously avoid contingent fee contracts in divorce litigation.

T. M. Murphree, Jr.

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[44]*But see* Note, *Attorney and Client—Contingent Fee Contract in Divorce, supra* note 7 at 278, n. 18, which argues for a blanket voidance of contingent fee agreements, even in the case of a property settlement supposedly independent of a divorce action.

[45]McCarthy v. Santangelo, 137 Conn. 410, 78 A.2d 240 (1951); Barngrover v. Pettigrew, 128 Iowa 533, 104 N.W. 904 (1905); Baskerville v. Baskerville, 246 Minn. 496, 75 N.W.2d 762 (1956), (overruling earlier cases on this point) stated: "Since the illegality of the contingent fee contract rests on the ground that it may govern a lawyer's action in a manner which thwarts public policy, the taint of illegality permeates the entire lawyer-client relationship in a divorce action so that every objection to permitting a recovery on the express agreement applies with equal force to an attempted recovery in *quantum meruit*." *Id.* at 773. A later case, Burns v. Stewart, 188 N.W.2d 760 (Minn. 1971), affirms the Minnesota court's stand on this point.

[46]Avant v. Whitten, 253 So. 2d 394 (Miss. 1971); Hay v. Erwin, 244 Or. 488, 419 P.2d 32 (1966); Ownby v. Prisock, 243 Miss. 203, 138 So. 2d 279 (1962).

[47]*In re* Fisher, 115 Ill. 2d 139, 153 N.E.2d 832 (1958) (censure); Nebraska State Bar Association v. Dunker, 160 Neb. 779, 71 N.W.2d 502 (1955) (censure); *In re* Smith, 42 Wash. 2d 188, 254 P.2d 464 (1953) (reprimand not administered only because question was one of first impression); *In re* Dangler, 182 N.Y.S. 471, 192 App. Div. 237 (1920) (suspension).

[48]CODE OF PROFESSIONAL RESPONSIBILITY (1970). Canon 2, EC 2-20 states: "Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relation cases are rarely justified."

CONSTITUTIONAL LAW — EQUAL PROTECTION — INDIGENT DEFENDANTS HAVE A RIGHT TO TRANSCRIPT WHEN APPEALING A MISDEMEANOR CONVICTION

Appellant was convicted on misdemeanor charges of violating two City of Chicago ordinances and was sentenced to pay a fine. The indigent appellant desired to appeal *in forma pauperis* on the grounds of insufficient evidence and prosecutorial misconduct and petitioned the trial court for a free transcript. His petition was denied because the charges against him were non-felony,[1] although the court did find that he was indigent. The Illinois Supreme Court denied a motion by appellant for an order that he be furnished with a free transcript.[2] On appeal to the United States Supreme Court, *held,* vacated and remanded. The equal protection clause of the fourteenth amendment prohibits a distinction between felony and non-felony cases in providing a trial transcript to an indigent appellant, and when a colorable need for a transcript is shown, the state has the burden of showing that less than a complete transcript will furnish a sufficient record for appellate review. *Mayer v. Chicago,* 92 S.Ct.410 (1971).

The right of appeal did not exist at common law, and although it is an integral part of our judicial system today, this right exists only where it is conferred by statute.[3] Once this right of appeal has been established, the equal protection clause of the fourteenth amendment prohibits any "unreasoned distinctions" between persons or groups of persons on account of their race, color, religion, or poverty.[4] For more than a century the judicial decisions of this country have supported the doctrine that an impecunious person should not be denied equal protec-

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[1]At the time of appellant's convictions an Illinois Supreme Court rule provided for a free transcript to indigent defendants convicted of felony charges, but it did not provide it to those convicted of non-felony charges. This rule has since been amended to provide for a free transcript to indigent defendants convicted of an offense punishable by six months imprisonment. ILL. ANN. STAT. ch. 110A, § 607 (b) (Smith-Hurd Supp. 1972).

[2]Other Illinois Supreme Court rules provide that in lieu of a verbatim transcript, appellant can prepare a proposed report of the trial and, after submitting to the other counsel for amendments, present it to the court for certification. A written stipulation concerning the facts of the trial can also be used. ILL. ANN. STAT. ch. 110A, §§ 323 (c), (d) (Smith-Hurd Supp. 1972). The appellant in the instant case did not resort to either alternative.

[3]American Life Ins. Co. v. Powell, 259 Ala. 70, 65 So. 2d 516 (1953); State *ex rel.* Patterson v. Autry, 236 Miss. 316, 321, 110 So. 2d 377, 378 (1959); Note, *The Right of Appeal,* 44 J. URBAN L. 505 (1967); ILL. CONST. art. 6, § 6; *accord,* MISS. CODE ANN. § 1150 (1956).

[4]Rinaldi v. Yeager, 384 U.S. 305, 310 (1966); Griffin v. Illinois, 351 U.S. 12, 17-18 (1956).

tion of the laws simply because of his poverty.[5] Poor people have been provided with equal protection of the laws by judicial decisions and statutes which have given them the right to counsel[6] and the means for an effective appeal.[7] The indigent's right to a free transcript of his trial in prosecuting a meritorious appeal is a firmly established principle in this country and is one way in which equal protection has been given to the indigent defendant.[8] This right must be free from any unconstitutional distinctions. The courts have held that distinctions made between felony and misdemeanor cases in deciding whether or not the right to free transcript and counsel exists are unconstitutional.[9] However, in *Griffin v. Illinois*[10] the Supreme Court considered such distinctions between capital and non-capital cases to be reasonable. The right to a free transcript has been limited to provide a partial transcript of only the essential points raised on appeal or some alternative that would present a sufficient record of the trial.[11] The Supreme Court has held that an indigent does not have to be given a complete transcript, but he must be furnished with an adequate record of the essential parts of the trial upon which his appeal is based.[12] If the appellant requests a transcript in good faith, the state has to show that less than a full transcript will adequately present the contentions upon which he has based his appeal.[13]

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[5]Douglas v. California, 372 U.S. 353, 357-58 (1963); Smith v. Bennett, 365 U.S. 708, 709 (1961); *cf.* Falkenburgh v. Jones, 5 Ind. 296 (1854). *See also* Gramenos, *The Impact of Constitutional Law on Criminal Appeals,* 57 ILL. BAR J. 178 (1968) (outlining the preparation of an appeal for the indigent defendant); Oaks & Lehman, *The Criminal Process of Cook County and the Indigent Defendant,* 1966 U. ILL. L.F. 584, 666-730 (a thorough discussion of the indigent defendant's rights in Cook County).

[6]Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45, 72-73 (1932); *accord,* Brown v. Mississippi, 297 U.S. 278 (1936); 18 U.S.C. § 3006A (Supp. 1972) (originally enacted as Criminal Justice Act of 1964, Pub. L. No. 88-455, 78 Stat. 552); MISS. CODE ANN. § 2505-01 (Supp. 1971).

[7]Draper v. Washington, 372 U.S. 487, 496 (1963); *see* Tarrants v. State, 219 So. 2d 170 (Miss. 1969); ILL. ANN. STAT. ch. 110A, § 607 (1967), *as amended,* (Smith-Hurd Supp. 1972); MISS. CODE ANN. § 1175 (1956).

[8]*See* Long v. District Court of Iowa, 385 U.S. 192, 194 (1966); Griffin v. Illinois, 351 U.S. 12, 19 (1956); 28 U.S.C.A. § 1915(b) (1966).

[9]*See* Wise, *Right to Counsel for Indigent Defendants in Mississippi,* 40 MISS. L.J. 187, 189 (1969); Husbands v. State, 105 Miss. 513, 62 So. 278 (1913) (permitted an *in forma pauperis* appeal from a conviction of a misdemeanor charge); *cf.* Groppi v. Wisconsin, 400 U.S. 505 (1971) (held that a distinction made between felony and non-felony cases for change of venue purposes is unconstitutional).

[10]351 U.S. 12 (1956).

[11]Draper v. Washington, 372 U.S. 487, 495-96 (1963); *accord,* Farley v. United States, 354 U.S. 521, 522 (1957).

[12]Hardy v. United States, 375 U.S. 277, 279 (1964); *accord,* Coppedge v. United States, 369 U.S. 438, 446 (1962).

[13]Woods v. Rhay, 54 Wash. 2d 36, 44-45, 338 P.2d 332, 337 (1959) (a procedure was outlined to determine when a free transcript should be provided, and the Supreme

In the instant case the Court held that an indigent appellant must be provided with an effective record of his trial to properly present his contentions on appeal. The Court also held that there could be no "unreasoned distinction" between felony and misdemeanor cases and that a misdemeanant should be afforded appellate review equal to that provided for a felon. Although the state must give an indigent a record of his trial, it does not always have to furnish a complete transcript. The Court said that the state could use other means to present the proceedings of the lower court, but the means used must afford the appellant with an adequate record of the parts of the trial upon which his claims are based. The Court found that when the need for a transcript is shown by the appellant, the state has the burden of proving that an alternative to a complete transcript will be sufficient. The Court decided that the Illinois statute,[14] which provided for transcripts in felony cases only, violated the fourteenth amendment. The City of Chicago contended that the transcript should not be provided because appellant was not subject to confinement, but only a fine. The Court rejected this argument and held that an invidious discrimination still existed. Therefore the Court concluded that appellant had to be given a sufficiently complete record to present his claims and that he did not have to show that the alternatives to a full transcript were inadequate; rather the City of Chicago had the burden of proving that the alternatives would be sufficient.[15]

The Court's decision is a continuation of a trend to provide everyone with equal protection of the laws. Included in this trend is the effort to make the indigent person truly equal under the laws and to make the judicial system easily accessible to him. The cases in recent years have held that the state must furnish a destitute defendant in a trial or appellate court with the means to defend himself equal to those which could be afforded by an affluent person. If this were interpreted literally, the states would have to spend an exorbitant amount of money to insure that the impecunious defendants get equal protection of the laws. Although the Court's opinion manifestly upholds the rights of the poor defendents, it qualifies those rights to a degree. A state is not expected to waste its funds simply because a rich person might choose to do so, but a state must provide the poor defendant with adequate and effective means for his defense at his trial and on appeal. Thus, the Court has provided the states with another guideline to determine what has to be done to satisfy the requirements of the equal protection clause, while it has made obvious its intention to preserve the indigent's rights. Another

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Court, in Draper v. Washington, 372 U.S. 487, 489-90 (1963), quoted this procedure); *see* Gardner v. California, 393 U.S. 367, 370 (1969); Eskridge v. Washington Prison Bd., 357 U.S. 214 (1958).

[14]ILL. ANN. STAT. ch. 110A, § 607(b) (Smith-Hurd Supp. 1972).

[15]In a concurring opinion, Chief Justice Burger agreed that transcripts should be provided to the indigent appellants, but he said that lawyers who requested a free transcript for a frivolous appeal merely to delay the cause are guilty of misconduct.

Justice Blackmun, in a separate concurring opinion, asserted that appellant's present earnings should be considered on remand.

point of the decision was the ruling invalidating distinctions made between felony and misdemeanor cases in providing transcript and other means of defense to an indigent defendant. This ruling should aid the various legislatures, as well as the courts, in formulating new laws and rules that will not discriminate between persons and that will give support to a more egalitarian system of justice.[16] The constitutional rights of the indigent defendant must be preserved, but determining exactly what is needed to preserve those rights is a major problem confronting the courts. Although the Supreme Court has set forth certain guidelines to make this determination, it is hoped that a more definite standard will be adopted in the near future which will help in alleviating this problem.

John Henson

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[16]Many states have amended their statutes within the past year to conform with the Supreme Court decisions involving the indigent's rights under the fourteenth amendment. *See, e.g.,* MISS. CODE ANN. § 2505-01 (Supp. 1971).

SUBJECT MATTER JURISDICTION — COUNTERCLAIMS — A COUNTY COURT'S JURISDICTION IS OUSTED WHEN A COUNTERCLAIM EXCEEDS ITS JURISDICTIONAL AMOUNT

The appellee, White, sued the appellant, Horton, on a promissory note with a balance due of $6,244.99 in the County Court of the First District of Hinds County. The appellant counterclaimed on 527 transactions, claiming usury and requesting $84,317.02.[1] A jury returned a verdict for the appellant for $84,000.00, but the appellee was awarded a judgment notwithstanding the verdict.[2] The appellant filed a new claim in the Circuit Court of the First Judicial District of Hinds County. The appellee filed and was granted a plea in bar of res judicata based on the prior judgment n.o.v., and the circuit court dismissed the action. The appellant contended that the judgment n.o.v. was based upon the county court's acknowledgment of its lack of jurisdiction, and therefore res judicata is not applicable. On appeal to the Supreme Court of Mississippi, *held,* reversed and remanded. County courts are without power to entertain a case where the defendant's counterclaim independently alleges, in good faith, an amount which exceeds its $10,000.00 limitation. *Horton v. White,* 254 So. 2d 188 (Miss. 1971).

One of the essential ingredients for a claim of res judicata to be effective is that the court be one of competent jurisdiction.[3] In Mississippi the jurisdiction of a county court does not extend to controversies involving more than $10,000.00.[4] This statute has been interpreted by the Supreme Court of Mississippi as establishing the county court's jurisdiction as general but definitely limited.[5] Since subject matter jurisdiction cannot be waived and may be raised at any stage of the proceedings, a court's decision without such jurisdiction is void.[6] Jurisdictional

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[1]The appellant was engaged in selling vacuum cleaners to the public. The appellee made loans for operating capital to the appellant charging excessive interest rates. Horton v. White, 254 So. 2d 188, 190 (Miss. 1971).

[2]However, the trial judge did not award either party a judgment. 254 So. 2d at 189.

[3]*Cf.* Stegull v. City of Jackson, 191 So. 2d 134 (Miss. 1966); Duvall v. Duvall, 224 Miss. 546, 80 So. 2d 752 (1955).

[4]MISS. CODE ANN. § 1604 (Supp. 1971) ". . . it shall have jurisdiction concurrent with the circuit and chancery court in all matters of law and equity wherein the amount of value of the thing in controversy shall not exceed, exclusive of cost and interest, the sum of TEN THOUSAND dollars ($10,000.00)."

[5]Barnes v. Rogers, 206 Miss. 887, 41 So. 2d 58 (1949); Daniels v. Jordan, 161 Miss. 78, 134 So. 903 (1931).

[6]Home Ins. Co. v. Watts, 229 Miss. 735, 93 So. 2d 848 (1957) (the court held that a court on its own motion should determine subject matter jurisdiction); Duvall v. Duvall, 224 Miss. 546, 80 So. 2d 752 (1955); Welch v. Bryant, 157 Miss. 559, 128 So. 734 (1930).

amount is determined from the initial pleadings[7] and is based upon good faith of the claimant.[8] A counterclaim may be considered part of initial pleadings.[9] Although a counterclaim asserted by a defendant cannot be added to the plaintiff's claim[10] or aggregated with other defendants' claims[11] to oust the limited jurisdiction of a court, each claim will be considered separately.[12] Courts of limited jurisdiction cannot entertain claims which exceed their limitation.[13]

In the instant case the court held that the county court is "one of general but limited jurisdiction."[14] The court also held that a counterclaim must meet the same jurisdictional prerequisites as a declaration. If either of the claims independently exceeds the jurisdictional amount, the county court is without jurisdiction. The court observed that the appellant's counterclaim exceeded $10,000.00 and concluded that the county court was therefore without jurisdiction over the counterclaim. It further held that the county court must dismiss or transfer the case to a proper court.

With this ruling the court furnished guidelines for the county court to follow when faced with this dilemma; the county court must dismiss or transfer the case. This will enable the courts to avoid some of the problems that have beset other jurisdictions. New York holds that once the court has acquired jurisdiction of the plaintiff's claim, it has the power to render judgment on any counterclaim.[15] The rule applied in the instant case is supported by the need for judicial efficiency. The appellant voluntarily counterclaimed where there existed several alternate remedies.[16] The case being tried on its merits, Horton had his day in court. To allow the appellant to begin a new action after a previous adjudication permits the appellant to have his case heard twice. How-

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[7]Barnes v. Rogers, 206 Miss. 887, 41 So. 2d 58 (1949); Catchot v. Russell, 160 Miss. 330, 134 So. 140 (1931). In addition, jurisdiction once acquired is not defeated by subsequent events, even though they would have prevented jurisdiction in the first instance.

[8]Horton v. White, 254 So. 2d at 191; Lucerne Packing Co. v. Panama Am. Sur. Co., 140 So. 2d 135 (Fla. Dist. Ct. App. 1962).

[9]*Cf.* MISS. CODE ANN. § 1483.5 (1956); Horton v. White, 254 So. 2d at 192. In Dyett v. Harney, 53 Colo. 381, 127 P. 226 (1912), the court held that a counterclaim is subject to the same limitations of jurisdictional amount as an action of the plaintiff.

[10]R. H. Green Wholesale Co. v. Hall, 184 Miss. 296, 185 So. 807 (1939).

[11]Horton v. White, 254 So. 2d at 192.

[12]*Id.;* Dupre v. Gilland, 156 S.C. 109, 152 S.E. 873 (1930) (attorney fees may be added to jurisdictional amount if it is agreed upon prior to the suit).

[13]Welch v. Bryant, 157 Miss. 559, 128 So. 734 (1930).

[14]Horton v. White, 254 So. 2d at 191.

[15]In Brink's Express Co. v. Burns, 230 App. Div. 559, 245 N.Y.S. 649 (Sup. Ct. 1930) the court held that a county court had complete jurisdiction over the entire counterclaim including that which exceeded its limitations.

[16]The appellant could have refrained from counterclaiming and simply filed a new action, or requested a transfer from the county court prior to the trial, or appealed within the alloted time.

ever, to allow a court to usurp subject matter jurisdiction cuts across the grain of well-founded jurisprudence[17] — a price too dear to pay for judicial efficiency. Other jurisdictions have held that when a counterclaim exceeds a court's jurisdictional amount, the court retains jurisdiction up to its jurisdictional amount; and the counterclaim may be utilized as an affirmative[18] or a defensive[19] action. In either situation the obvious question is what happens to the excess? Does the defendant waive it, or must he bring a new action? A forced waiver of the excess is extremely unjust, and if the defendant must bring a new action, the court is taxed with an additional trial. On the other hand, when the plaintiff's claim is limited to a dismissal or transferral, the plaintiff has lost his choice of forum or is burdened with the additional expense of the transfer. Choice of forum, however, was never intended to give the plaintiff anything but a convenient and competent place to have his cause heard. Furthermore, although it is true that a transfer will be an additional expense, it is not as expensive or inconvenient as having two trials for one action. Rendering this decision, the Supreme Court of Mississippi has been effective in streamlining Mississippi jurisprudence by not permitting county courts to act at all when they have only partial jurisdiction. An all-or-none theory of subject matter jurisdiction is the most efficient and effective method for adjudicating claims.

William H. Shaheen

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[17]Home Ins. Co. v. Watts, 229 Miss. 735, 93 So. 2d 848 (1957); Duvall v. Duvall, 224 Miss. 546, 80 So. 2d 752 (1955); Welch v. Bryant, 157 Miss. 559, 128 So. 734 (1930).

[18]Nelson v. Meyer, 66 Colo. 168, 180 P. 86 (1919) held that counterclaims may be considered as defensive measures to the extent the plaintiff's claim can be determined.

[19]Holmes v. Straus, 283 Ill. 621, 119 N.E. 708 (1918); Oglesby Granite Quarries v. Schott Monument Co., 540 Ohio St. 196, 6 N.E.2d 766 (1935). The courts in both states are allowed to use counterclaims as an affirmative action to the court's limitation.

Constitutional Law — Women's Rights — Statutory Provision Giving Mandatory Preference to Men Over Women When Appointing Estate Administrator Violates the Equal Protection Clause of the Fourteenth Amendment

Mother and father of a deceased son filed separate petitions for administration of decedent's estate. The probate court held a joint hearing on the two petitions and ordered that letters of administration be issued to the father pursuant to an Idaho statute that compelled a preference for males over females of equal entitlement.[1] On appeal to the District Court of the Fourth Judicial District of Idaho, the case was remanded because the challenged code section violated the equal protection clause of the fourteenth amendment.[2] The father appealed this decision to the Idaho Supreme Court, which rejected the mother's contention that the statute violated the equal protection clause and reversed the District Court. On appeal to the United States Supreme Court, *held,* reversed. A statutory provision that gives mandatory preference to men over women, when persons of the same entitlement class apply for appointment as administrator of a decedent's estate, violates the equal protection clause of the fourteenth amendment.[3] *Reed v. Reed,* 91 S.Ct. 251 (1971).

The plight of the American woman was initially thrust into national focus by the 1872 decision in *Bradwell v. The State,*[4] in which the Supreme Court upheld Illinois' refusal to admit women to the practice of law. In *Bradwell* the Court illustrated the male supremacist attitude by declaring that women belong at home.[5] Women's rights were again highlighted in the 1908 case of *Muller v. Oregon,*[6] which suggests that "sex

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[1] Idaho Code Ann. § 15-312 (1948) provides in part:

> *Priorities in right of administration.*—Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, and they are respectively entitled thereto in the following order: 1. The surviving husband or wife or some competent person whom he or she may request to have appointed.

Idaho Code Ann. § 15-314 (1948) further provides:

> *Preferences.*—Of several persons claiming and equally entitled to administer, males must be preferred to females, ...

[2] U.S. Const. amend. XIV, § 1, provides in part: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

[3] On March 12, 1971, the Idaho Legislature adopted the *Uniform Probate Code,* effective July 1, 1972. On that date, §§ 15-312 and 15-314 of the former code were effectively repealed.

[4] 83 U.S. (16 Wall.) 130 (1872).

[5] Justice Bradley, in his concurring opinion, states: "The constitution of the family organization, . . . indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood." *Id.* at 141.

[6] 208 U.S. 412 (1908). A statute that limited the hours of employment for women was held to be constitutional.

is a valid basis for classification."[7] The *Muller* opinion, which many feel has been interpreted too broadly,[8] stressed the woman's need for employment protection.[9] The women's rights movement gained an added impetus in 1920 when the nineteenth amendment granting suffrage to women was adopted, but feminists were again dealt a devasting blow in 1948 by the Court's opinion in *Goesaert v. Cleary*.[10] *Goesaert* was basically the first litigation in which the argument of "equal protection" was submitted,[11] and the Court dismissed this argument by stating that the discriminatory statute in question was neither unreasonable nor arbitrary.[12] Some state courts have rejected the "reasonableness" test for sex classification that was applied in *Goesaert*[13] and have substituted the more stringent "suspect classification" and "compelling interest" tests.[14]

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[7]*Id.* at 420. This interpretation has evolved from the following words from the Court's opinion:

> [The] widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she be permitted to toil. *Id.* at 420.

[8]One writer insists that much of the court's language was unnecessary. "Unfortunately, the argument's appeal to male chivalry resulted in language unnecessary to the narrow holding of the decision, ..." *Are Sex-Based Classifications Constitutionally Suspect?*, 66 Nw. U. L. Rev. 481, 484 (1971). Another writer states: "The *Muller* case involved a state maximum hours law for women, but the case language has been divorced from its context and loosely applied." *A Woman's Place: Diminishing Justifications for Sex Discrimination in Employment*, 42 So. Cal. L. Rev. 183, 200, 201 (1969).

[9]Muller v. Oregon, 208 U.S. 412 (1908). The court stated, ". . . the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race." *Id.* at 421.

[10]335 U.S. 464 (1948). The court upheld a Michigan statute that prohibited a female from working as a bartender unless she was the "wife or daughter of the male owner." *Id.* at 465.

[11]*See* Brown, Emerson, Falk, & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 Yale L.J. 871, 877 (1971) [hereinafter cited as Brown].

[12]The "reasonableness" test applied in Goesaert v. Cleary, 335 U.S. 464 (1948) is the traditional equal protection test used to determine whether a statutory classification is valid. Under this view, the statute is valid if it is reasonable and not arbitrary to the legislative objective of the statute. *See* Morey v. Doud, 354 U.S. 457 (1957); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

[13]*See, e.g.*, Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 95 Cal. Rptr. 329, 485 P.2d 529 (1971). Overruling a statute that prohibited females from working as bartenders, the California Supreme Court blasted the "reasonableness" test used by the Supreme Court and adopted the more stringent "suspect classification" and "compelling interest" tests.

[14]Basically, this means that any classification that is determined to be "suspect" is subject to a much stricter standard of review than under the reasonableness test. For example, under these tests any classification based on sex is strongly suspect, . . . "bears a heavy burden of justification . . . and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state

The Supreme Court and most state courts, however, have consistently applied the reasonableness standard to sex discriminating statutes.[15] After *Goesaert,* one of the most significant influences upon the women's rights movement was the 1964 Civil Rights Act.[16] Not only did this Act cause many states to pass legislation prohibiting sex discrimination,[17] it also provided women with a new basis for litigation.[18] Nevertheless, the most frequent basis for litigation has continued to be the violation of the equal protection clause.[19] Although the Supreme Court has continued to uphold sex discriminatory policies[20], modern state courts and lower federal courts have begun to grant to women new privileges that were formerly denied them.[21]

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policy." McLaughlin v. Florida, 379 U.S. 184, 196 (1964); *accord,* Shapiro v. Thompson, 394 U.S. 618 (1969); Loving v. Virginia, 388 U.S. 1 (1967); Kramer v. Union Free School District, 395 U.S. 621 (1969).

[15]*See* Williams v. McNair, 316 F. Supp. 134 (D.S.C. 1970); Hoyt v. Florida, 368 U.S. 57 (1961); LaFleur v. Cleveland Board of Education, 326 F. Supp. 1208 (N.D. Ohio 1971); Eslinger v. Thomas, 324 F. Supp. 1329 (D.S.C. 1971); State v. Hall, 187 So. 2d 861 (Miss. 1966).

[16]Title VII of the 1964 Federal Civil Rights Act generally prohibits employment discrimination because of an individual's sex. 42 U.S.C. § 2000e-2(a) (1970). Nevertheless, the Act does permit sex classification when sex is found to be a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e) (1970).

[17]In a suit based on the Act, the party would claim that the state law violated the Act, and the supremacy clause required that the state law yield to federal law. *See* Rosenfeld v. Southern Pacific Co., 293 F. Supp. 1219 (C.D. Cal. 1968) (statute that denied a woman a certain job was found to conflict with title VII of the Act, and the state law was forced to yield to the federal law). *See generally* Gudbrandson v. Genuine Parts Co., 297 F. Supp. 134 (D. Minn. 1968).

[19]*See* cases cited note 15 *supra.*

[20]*See* Hoyt v. Florida, 368 U.S. 57 (1961) (statute excluding women from jury service unless they volunteered was upheld). *Contra,* Reed v. Reed, 92 S.Ct. 251 (1971).

[21]*Compare* Patterson Tavern & Grill Owners Assn. Inc. v. Borough of Hawthorne, 57 N.J. 180, 270 A.2d 628 (1970) (bartending upheld); United States *ex rel.* Robinson v. York, 281 F. Supp. 8 (D. Conn. 1968) (longer prison sentences for women than men when same crime is committed held invalid); Karcqewski v. Baltimore & O. R.R., 274 F. Supp. 169 (N.D. Ill. 1967) (loss of consortium allowed); White v. Crook, 251 F. Supp. 401 (M.D. Ala. 1966) (statute barring women from jury duty held invalid); Kirstein v. Rector & Visitors of the Univ. of Virginia, 309 F. Supp. 184 (E.D. Va. 1970) (state university must admit women); Cohen v. Chesterfield County School Board, 326 F. Supp. 1159 (E.D. Va. 1971) (policy requiring a leave of absence after five months pregnancy held invalid), *with* Goesaert v. Cleary, 335 U.S. 464 (1948) (bartending disallowed); *Ex parte* Gosselin, 141 Me. 412, 44 A.2d 882 (1945) (statute imposing longer maximum sentence on women than on men upheld); Miskunas v. Union Carbide Corp., 399 F.2d 847 (7th Cir. 1968) (loss of consortium denied); State v. Hall, 187 So. 2d 861 (Miss. 1966) (exclusion of women from jury upheld); Heaton v. Bristol, 317 S.W.2d 86 (Tex. Civ. App. 1958) (admission into all-male school denied); LaFleur v. Cleveland Bd. of Educ., 326 F. Supp. 1208 (N.D. Ohio 1971) (policy requiring leave of absence after four months pregnancy upheld).

In the instant case the Court recognized that the fourteenth amendment does not deny states the power to treat different classes of persons in different ways.[22] The court noted, however, that the classification must be reasonable, not arbitrary, and substantially related to the legislative objective.[23] The Court determined that the objective of the discriminating Idaho statute was to reduce "the workload on probate courts by eliminating one class of contests." Nevertheless, the Court unanimously concluded that, although the statutory objective was "not without some legitimacy," giving mandatory preference to one sex over the other simply to eliminate hearings on the merits was the type of arbitrary legislation forbidden by the equal protection clause of the fourteenth amendment.[24]

The Court's decision represents a beneficial contribution to the female campaign for equality, and its immediate effects are apparent. The decision will certainly require noteworthy changes in those states whose probate statutes are similar to those in Idaho. It may also cause state officials to re-examine other statutory provisions that classify persons according to their sex. The total significance of the Court's decision, however, is questionable. Undeniably sex-based distinctions are becoming socially and politically unacceptable. As a result the value of the fourteenth amendment as a means of preventing discrimination is being challenged.[25] While some proponents of the feminist movement argue for a change in the Court's standards for testing sex classifications,[26]

[22]In the opinion, the Court relied on the following cases: Barbier v. Connolly, 113 U.S. 27 (1885); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949); McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1968).

[23]When explaining the reasonableness test, the Court cited Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

[24]92 S. Ct. at 254.

[25]As one opinion states:

> On this state of affairs one cannot say that the possibility of achieving substantial equality of rights for women under the Fourteenth and Fifth Amendments is permanently foreclosed. But the present trend of judicial decisions, backed by a century of consistent dismissal of women's claims for equal rights, indicates that any present hope for large-scale change can hardly be deemed realistic. Brown, *supra* note 11, at 882.

[26]The Supreme Court's continued reluctance to adopt the strict standard of review for sex-discriminating cases is very perplexing. As indicated in note 14, *supra,* if a court determines a particular area to be "suspect," then any discriminating statute in that area would be invalid unless it were justified by a "compelling state interest." In view of the fact that areas such as "race" and "wealth" have been deemed suspect (*see, e.g.*, McLaughlin v. Florida, 379 U.S. 184 (1964) and Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966)), it seems logical that sex would also be considered a suspect area. However, no indication of such a change is evident in *Reed*. One reason for this might be that the statute was easily considered invalid under the traditional reasonableness test, and the more strict standard was simply not needed. Thus, the Court might be waiting for a more timely introduction of the strict standard of review.

As far as this writer is concerned, it seems likely that sex will become a "suspect" area in the near future. As stated in note 27, *infra,* an equal rights amendment has

others insist that only a constitutional amendment will grant them relief.[27] Unfortunately, the general notions of male supremacy prevail today,[28] despite the fact that women comprise thirty-seven percent of the United States work force.[29] Thus, additional legislation and litigation will be necessary before women can hope for complete co-extension of rights. While it is unlikely that the Court's decision standing alone will accomplish these objectives, hopefully it does indicate that future successful challenges are forthcoming.

David Wilder

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been passed by Congress. If this amendment is ratified by the states, certainly enough emphasis will be placed on sex to designate it a suspect area. At any rate, the continued attack on the present Court standard (*see Are Sex-Based Classifications Constitutionally Suspect?, supra* note 8 at 492) and the adoption of some states of the strict standard [*see, e.g.,* Sail'er Inn, Inc. v. Kirby, 95 Cal. Rptr. 329, 5 Cal. 3d 1, 485 P.2d 529 (1971)] indicate the general feelings on the subject.

[27]An equal rights amendment for women has been proposed in every Congress since 1923. *See* Brown, note 11 *supra,* at 886. The currently proposed amendment reads in part: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." H.R.J. RES. No. 208, 92d Cong., 1st Sess. (1971). Interestingly enough, the 1972 Congress has passed such an amendment and all that remains before the amendment is adopted is ratification by two-thirds of the states. As eight states have already ratified the bill, it seems likely that the amendment will become a reality. One source, who is quite enthusiastic about the value of such an amendment, states:

> [T]he Amendment will establish fully, emphatically, and unambiguously the proposition that before the law women and men are to be treated without difference. Brown, *supra* note 11, at 980.

Contra, Kanowitz, *Constitutional Aspects of Sex-Based Discrimination in American Law,* 48 NEB. L. REV. 131 (1968). In his article the author gives the impression that the amendment would not result in any major changes for women.

> [I]t is submitted that were the amendment adopted, it would have little or no effect upon existing Constitutional doctrine in the area of sex discrimination. Then, as now, the crucial factor will continue to be the responsiveness of the judiciary to the social impulse toward equality of treatment without regard to sex. [*Id.* at 181].

[28]Even the 100 year lapse since *Bradwell* has not produced a significant increase in the number of women lawyers. In a survey in which six major cities were included, it was determined that there was a total of 40 major law firms with 2,708 lawyers. Out of these 2,708 lawyers, only 186 were women. Hollowell, *Women and Equal Employment: From Romantic Paternalism to the 1964 Civil Rights Act,* 56 WOMEN LAW. J. 28, 33 (1970). For other examples of male supremacy, *see* Boyer, *Equal Opportunity for Women—In Our Time,* 56 WOMEN LAW. J. 5, 7-10 (1970).

[29]*See* U.S. BUREAU OF LABOR STATISTICS, HANDBOOK OF LABOR STATISTICS 28, 29 (1971).

Criminal Procedure — Search and Seizure — Warrantless Search of Arrestees' Briefcases Outside the Area Within Their Immediate Control Is Unlawful

The petitioners were convicted in federal district court for possession of unregistered firearms in violation of federal law.[1] Entertaining certain suspicions, police officers questioned, frisked, and arrested petitioners for not carrying draft cards.[2] Upon the approach of the officers, the petitioners placed their briefcases on the sidewalk and after the initial questioning walked away from them. The police pursued the petitioners a short distance and made the arrest. Following the arrest and placement of the petitioners in the police car, the officers retrieved the briefcases. A warrantless search revealed a sawed off shot gun in each briefcase. Contending that this warrantless search and seizure was conducted outside the area within their immediate control and thus violated their rights under the fourth amendment, petitioners moved to have the evidence procured from the search suppressed. The district court denied the motion to suppress, upholding respondent's contention that the search and seizure fell within the exception of the immediate control rule. On direct appeal to the Fifth Circuit Court of Appeals, *held* reversed. When arrestees are secured in a police car, a warrantless search of their briefcases outside the car and beyond the arrestee's immediate control is violative of the fourth amendment. *United States v. Colbert,* 454 F.2d 801 (5th Cir. 1972).

The incorporation of the fourth amendment into the Constitution was a reaction to the despotic practices of the English King, allowing unwarranted intrusions upon property and persons.[3] The past sixty years have produced a prolificacy of judicial pronouncements aimed at establishing workable as well as constitutional guidelines for both the warranted and warrantless search and seizure. In its first significant opinion the United States Supreme Court indicated that a warrantless search of the person for "fruits of the crime" when incident to a valid

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[1] 26 U.S.C. § 5861 (d) (1964) providing: "It shall be unlawful for any person to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record."

[2] 50 U.S.C. App. § 462 (1964).

[3] U.S. Const. amend. IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Compare Miss. Const. art. 3, § 23:

> The people shall be secure in their persons, houses, and possessions, from unreasonable seizure or search; and no warrant shall be issued without probable cause, supported by oath or affirmation, specially designating the place to be searched and the person or thing to be seized.

arrest is not violative of the Fourth Amendment.[4] From there it was only a matter of time before the permissible scope of the warrantless search was expanded to include the area within the arrestee's control.[5] It was again expanded to include the place of arrest[6] and all areas of the premises used for illegal purpose.[7] Search of areas other than the arrestee's person was limited by whether a crime was being committed in the presence of the arresting officers.[8] Reversing direction again, the Supreme Court rendered two decisions expanding the scope of the warrantless search to areas not only within the arrestee's physical possession, but to those areas within his "constructive possession" as well.[9] In between these two significant decisions emerged another holding by the Court wherein the determinative factor was one of reasonableness. The Court found that when it was practical to first obtain a search warrant, failure to do so would render the search an unreasonable one.[10] Much time was to pass before the Court returned to this standard. During the 1950's, decisions continued to expand the scope of the warrantless search to areas more remote in time and place from the incidental arrest.[11] Concluding that the scope of the warrantless search incident to arrest had traveled too great a distance, the Court found a resting place in 1969 in *Chimel v. California*.[12] The Court held that a warrantless search incidental to an arrest is valid only in areas within the "immediate control" of the arrestee.[13]

In the instant case the Fifth Circuit Court of Appeals found that *Chimel* supplied the "authoritative statement concerning the constitutionally permissible scope of a warrantless search incident to a lawful

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[4]Weeks v. United States, 232 U.S. 383 (1914).

[5]Carroll v. United States, 267 U.S. 132 (1925).

[6]Agnello v. United States, 269 U.S. 20 (1925).

[7]Marron v. United States, 275 U.S. 192 (1927).

[8]Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931); United States v. Lefkowitz, 285 U.S. 452 (1932).

[9]United States v. Harris, 331 U.S. 145 (1947); United States v. Rabinowitz, 399 U.S. 56 (1950). Upholding a warrantless search of four rooms lasting five hours, incidental to a search with a warrant, the Court in the *Harris* decision ignored the element of practicality in obtaining search warrant and construed those areas within the arrestee's control to include those areas of constructive possession. The Court stated that a thorough search was necessary because the object of the search was small in size. Following those standards of constructive possession promulgated by *Harris,* the *Rabinowitz* decision expressly overruled Trupiano v. United States, 344, U.S. 699 (1948). The court held that where the police officers obtained an arrest warrant but not a search warrant, the necesssity of procuring the search warrant was dependent not on the practicality of obtaining it, but rather upon the reasonableness of the search after the arrest.

[10]Trupiano v. United States, 344 U.S. 699 (1948).

[11]*E.g.,* Clifton v. United States, 224 F.2d 329 (4th Cir. 1955).

[12]Chimel v. California, 395 U.S. 752 (1969). *Chimel* rejected the theories of *Harris* and *Rabinowitz* and returned to the standards of *Go-Bart, Lefkowitz,* and *Trupiano.*

[13]395 U.S. at 768.

arrest."[14] The court reiterated the *Chimel* limitation that the searched area must be within the "immediate control" of the arrestee and repeated that the area of "immediate control" is that area from within which the arrestee might reach to grab a weapon or destructible evidence.[15] Stating that it did not decide whether the briefcases might have been legally searched at any other time during the frisking or arrest procedure, the court relied on *Preston v. United States*[16] to invalidate the search which occurred after the arrestees were sitting in the patrol car some "few" feet from the briefcases.[17] Moreover, the court rejected the respondent's argument that *Carroll v. United States*[18] created an exception validating the warrantless search in the instant case.[19] Rather the Circuit Court relied on *Coolidge v. New Hampshire*[20] to emphasize the necessity for obtaining a search warrant unless exigent circumstances make it impractical.[21] Dissenting, Judge Dyer "strenuously" concluded that since "one short lunge" by either of the arrestees would have brought the briefcases within their control, the necessary exigent circumstance as allowed by *Chimel* and *Coolidge* was present.[22]

In the instant case the court was properly cognizant of the standards required by *Chimel*. Courts have been vitally concerned with the protection of individual liberty as guaranteed by the fourth amendment; any evidence which is found and seized in violation of that right must not be allowed to form any basis of a criminal conviction. The instant case most poignantly presents one of the problems in applying the *Chimel* standards — how to determine the exact area which may be deemed within the "immediate control" of the arrestee. The dissent, founded on this point, is bolstered by a 1969 decision upholding a search of an automobile within leaping distance of the arrestee.[23] A statement in the dissent (although not a theory pursued by that circuit judge) suggests another vital element of the arrest and search process — the disclaimer of ownership of the briefcases by the arrestees.[24] There is an abundance of decisions upholding warrantless searches and seizures when the arrestees either abandoned or disclaimed ownership or interest. Several decisions have announced various circumstances in which prop-

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[14]United States v. Colbert, 454 F.2d 801, 803 (5th Cir. 1972).

[15]*Id.*

[16]376 U.S. 364 (1964). *Preston* held that the search of an automobile, once it was in police custody and the arrestee in jail, was invalid because the mobility of the automobile was effectively restricted.

[17]454 F.2d at 804.

[18]267 U.S. 132 (1925).

[19]454 F.2d at 804.

[20]403 U.S. 443 (1971) (warrantless search of an automobile parked in the arrestee's driveway held invalid since there was no danger of its removal).

[21]454 F.2d at 804.

[22]*Id.* at 805.

[23]Application of Kiser, 419 F.2d 1134 (8th Cir. 1969).

[24]454 F.2d at 805.

erty will not be deemed abandoned.[25] It seems that the instant case in no way falls within the purview of these decisions, but rather conforms to the findings of others with strikingly similar factual situations.[26] Courts which have upheld such warrantless searches of abandoned property incident to arrest generally conclude that in fact no actual search or seizure within the "legal meaning" of the term has occurred.[27] When there is available to a court a theory upon which to uphold a police procedure in protection of the public welfare, it seems that the rendering court should give the theory due consideration while also giving due consideration to individual liberties.

Ann Wynne Ball

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[25]United States v. Fay, 239 F. Supp. 132, 135 (S.D.N.Y. 1965) (an object was not abandoned when the arrestee dropped it after the arresting officer made a move toward his gun); Ingram v. State, 45 Ala. App. 108, 226 So. 2d 169 (1969) (where an officer was unlawfully within a private yard, no object he found there would be deemed abandoned); Moss v. Cox, 311 F. Supp. 1245 (E.D. Va. 1970) (a marijuana cigarette dropped by the arrestee was inadmissible since it was dropped during the officer's search).

[26]Hayes v. State, 44 Ala. App. 539, 215 So. 2d 604 (1968) (articles dropped to the ground after the police had told the suspect to halt were abandoned and lawfully subject to examination by the officers); Oliver v. State, 449 P.2d 252 (Sup. Ct. Nev. 1969) (a white object thrown to the ground after the defendant was arrested by warrant for traffic violations, was admissible as abandoned property in a conviction for possession of marijuana).

[27]Burton v. United States, 272 F.2d 473 (9th Cir. 1959). In holding heroin dropped from beneath a coat admissible, the court stated:

> [W]e find no evidence of illegal search and seizure, and in fact we find no evidence of any search . . . no seizure . . . within the legal meaning of that term. The heroin was abandoned property. [*Id.* at 467-77].

Lee v. United States, 221 F.2d 29 (D.C. Cir. 1954). In admitting evidence dropped to the street the court stated:

> There was here no seizure in the sense of the law when the officers examined the contents of the napkin after it had been dropped to the street. [*Id.* at 30].

BOOK REVIEWS

The Lawyer, The Public, And Professional Responsiblity

F. Raymond Marks with Kirk Leswing and Barbara A. Fortinsky. Chicago, American Bar Foundation, 1972. Pp. xii + 305. $7.95

This book is the result of an American Bar Foundation study, funded in a large part by a Ford Foundation grant, of response by the private bar to the public interest. Working from a series of interviews with individual attorneys, the authors have compiled a well-organized, logical, and readable book from which to present the thesis that public interest law is really synonymous with the practice of law and that the legal system is to be operated in trust for the good of the public.

From the time that the legal profession first started organizing in the late nineteenth century, the question of professional responsibility to the public has arisen as an important issue. In the twentieth century the bar split into two camps: a public bar, which attempted to insure legal representation for all who needed it, and a private bar, which catered to paying clients. However, a condition was soon reached whereby Big Government was represented by the public lawyer; Big Business was represented by the private lawyer; and The People were notably unrepresented. The social upheaval of the 1960's brought into sharp focus the glaring failure to give all Americans equal access to the legal system. It was this failure to make the Bill of Rights a reality that has prompted the current "public interest" urges and responses which this book analyzes within the legal profession.

The authors first examine the present public interest response of today's bar. Private firms have used several different approaches to meet this responsibility. Some firms have formed a public interest department or named a public interest partner to work within the firm framework. Others have established branch offices in ghettos or allowed partners and associates to be released from the commitments of the firm to engage in non-fee work. Next the groups that serve as brokers for this public interest work are examined. These groups include the Community Law Offices, the Lawyer's Committee on Civil Rights, OEO Legal Services, and the American Civil Liberties Union. Also examined is the new phenomenon called the public interest law firm, which is committed to meet the needs of the public. These firms, such as the Washington Research Project, the Center for Law and Social Policy, and the Native American Rights Fund, are organized to represent a broad range of individual client groups such as consumers, pollution-control groups, and minorities. The main drive behind the public interest firm is to bring about reform for each of the policies or groups which they represent. The final product of this change within the legal profession is the active response of the organized bar to bring the legal system to all our citizens. America's lawyers, it is said,

must come to grips with the need for making the public interest the responsibility of all practitioners. It is only in this way, the authors suggest, that there will truly be equal justice for all.

The authors conclude that the legal profession is at a crossroads in its existence. Will the remedying of the social needs which the new responsiveness has sought to redress become an integral part of the professional ethic, or will the imbalance of legal services continue so that the lawyers' sense of duty will still not extend beyond economic self-interest and loyalty to regular clients? The burden of replying to social need is felt to be a responsibility of the profession which must be met as a moral and legal obligation.

In the authors' words, the haunting question for the entire profession remains:

> The public interest responder is raising for himself and for his profession the question whether the law is a profession after all if it will not relate its daily occupation to the very core of the legal imperative: resolution of social conflict and the evolution of fair and just rules for the society.

William C. Trotter III

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